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MILITARY LAW REVIEW

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ARTICLE 31(b) TRIGGERS: RE-EXAMINING THE "OFFICIALITY DOCTRINE"

MAJOR **HOWARD** O. MCGILLIN, JR.*

I. Introduction

> No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him. . . .[1]

Article 31(b) of the Uniform Code of Military Justice (UCMJ) is beautiful in its simplicity. Yet, as recently as September **1993,** the United States Court of Military Appeals (COMA) held that the Article just does not mean what it says.[2] According to the COMA, Article 31(b) means:

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This article is based on a written dissertation that the author submitted to satisfy, in part, the Master of Laws degree requirements of the 42d Judge Advocate Officer Graduate Course. I wish to thank LTC Dave Hayden who served as my faculty advisor during the production of the graduate thesis and MAJ Ralph Kohlmann, USMC, who contributed insightful and meaningful comments during the publication process.

[1] UCMJ art. 31(b) (1988).

[2] In 1993, in ***United States** v. Raymond*, the COMA held that a civilian social worker, employed by the Army, did not have to advise a soldier of his rights before a social work inquiry **into** allegations of child abuse. **38** M.J. 136, 140 (C.M.A. 1993). The court reaffirmed that military medical personnel generally conduct their inquiries for the benefit of the soldier, not law enforcement. Furthermore, in this case, the interview was not part of a greater investigation by the Criminal Investigation Division against this soldier. *Id.* at 138. Effective **October** 5, 1994, The National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (to be codified at 10

> No person subject to this chapter except medical personnel[3] and persons acting out of purely personal curiosity,[4] but including post exchange detectives[5] and possibly state and foreign social workers[6] and police who have a congruent investigation,[7] may interrogate, for purposes of criminal, or quasi-criminal civil, prosecution clearly contemplated at the time of interrogation,[8] or may request any statement from an accused or a person suspected, either objectively or subjectively,[9] of an offense, only if the person being questioned is aware that the person asking the questions is acting in a law enforcement or disciplinary fashion,[10] without first informing him ....

U.S.C. § 941) renamed the United States Court of Military Appeals (COMA) the United States Court of Appeals for the Armed Forces (CAAF). This article will use the title of the court that was in place when the decision was published.

[3] *See, e.g.*, United States v. Fisher, **44** C.M.R. 277 (C.M.A. 1972); United States v. Baker, 29 C.M.R. 129 (C.M.A. 1960) (medical personnel need not issue rights warnings).

[4] *See* United States v. Duga, 10 M.J. 206 (C.M.A. 1981). *See infra* text accompanying notes 307-76.

[5] *See* United States v. Quillen, 27 M.J. 312 (C.M.A. 1988). *See also infra* text accompanying notes 416-48.

[6] *See* United States v. Moreno, 36 M.J. 107 (C.M.A. 1992). Moreno was interviewed by a Texas state social worker. The interview occurred by appointment and off post. The interviewer worked for the social services department and had no apparent (or subrosa) connection to the military. *Id.* at 115-17. The State of Texas and Fort Bliss had a memorandum of understanding that allowed Texas social work personnel to investigate child abuse cases on post. *Id.* at 116. The COMA held that because the social worker was not functioning as part of the military investigation, she had no reason to read Moreno his rights. *Id.* at 117.

[7] *See* United States v. Lonetree, 35 M.J. 396 (C.M.A. 1992) *cert. denied*, 113 S. Ct. 1813 (1993). In *Lonetree*, the COMA held that, as a matter of law, government civilian agents need not read a service member his rights if they are not engaged in a *criminal* investigation that has merged with an ongoing military *criminal* investigation. *Id.* at 403-05. Lonetree had served as part of the Marine security detachment at the United States embassy in Moscow. He had engaged, over time, in a relationship with Soviet nationals who were KGB operatives. His actions seriously compromised security at the embassy. His activities came to light when Lonetree voluntarily approached a civilian United States intelligence agent at the Vienna embassy where he had been reassigned. In a series of interviews with these agents, known as the "Johns," Lonetree revealed the full scope of his illegal activities. These intelligence agents were neither members of the military nor affiliated with military law enforcement. *Id.* at 399. Reviewing the case on appeal, the COMA held that the agents were not acting as agents of the military, nor had their investigation merged into an indivisible entity with the military criminal investigation. *Id.* at 405.

[8] *See* United States v. Loukas, 29 M.J. 385 (C.M.A. 1990). *See also infra* text accompanying notes 456-93.

[9] *See generally* United States v. Morris, 13 M.J. 297 (C.M.A. 1982). This article does not specifically examine the suspect trigger of Article 31(b). The test the COMA employs is a combination objective-subjective approach. The test to determine whether a person is a suspect is whether, considering all of the facts and circumstances at the time of the interview, the government interrogator believed or should have believed that the one interrogated committed an offense. *Id.* at 298.

[10] *See* United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981).

Legitimate reasons exist to narrow the perhaps overly broad statutory language of Article 31. Among other reasons, they exist primarily because the UCMJ is but one tool in a commander's disciplinary and leadership arsenal.[11] The problem in applying Article 31(b) is one of line drawing—when is the commander, or any leader in the armed forces, using his or her disciplinary tools and when is he or she merely exercising one of the many command or leadership prerogatives? More important to this analysis, however, is the question, how do we expect the service member under scrutiny to know the difference?

Throughout the history of Article 31(b), the COMA has struggled with these core issues. Increasingly, the analysis has become more tangled and confusing. Perhaps the primary reason for this has been the reluctance of the COMA to apply, properly, the principles underlying Supreme Court law from *Miranda v. Arizona*[12] to cases arising under the UCMJ.[13]

The Supreme Court drew the line for law enforcement officials in *Miranda*.[14] In that case, the Court decided that the average United States citizen does not know he or she has certain constitutional rights when confronted by the police.[15] Congress made a similar decision in 1949 in creating Article 31(b) as part of the UCMJ.[16] However, Congress had an additional motive in 1949 that the Supreme Court did not have in *Miranda*. Congress wanted to eliminate the unique pressures of military rank and authority from military justice.[17]

Miranda states that the police may not conduct a custodial interrogation without first informing the individual of his or her right to remain silent and avoid self-incrimination.[18] Several trig-

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[11]Military commanders have a full range of disciplinary power available to them. The UCMJ is a codification of criminal and nonjudicial disciplinary actions. ***See generally*** UCMJ arts. 15, 78-134 (1988). ***See also*** DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE, PRACTICE AND PROCEDURE § 8-1 (3d ed. 1992) (discussing range of options). Commanders also may discipline service members using administrative reprimands and formal and informal counseling. ***See, e.g.,*** 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE §§ 3-20.00 to 3-22.20 (1991). Commanders also may recommend discharge from the service with a less than honorable discharge as a punitive action. ***Id.***

[12]384 U.S. 436 (1966).

[13]***See generally infra*** text accompanying notes 306-76.

[14]*Miranda*, 384 U.S. at 444.

[15]***See generally id.*** at 445.

[16]See ***generally infra*** text accompanying notes 190-216.

[17]*See* ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES, 10-15 (1956); ***infra*** text accompanying notes 527-40. ***See also*** Edmund Morgan, ***The Background of the Uniform Code of Military Justice,*** 6 VAND. L. REV. 169 (1952).

[18]*Miranda*, 384 U.S. at 444.

gers exist: the questions must come from someone in law enforcement;[19] they must occur in a custodial setting,[20] and the questioner must be asking questions that may be reasonably expected to elicit incriminating information.[21]

On its face, in contrast, Article 31(b) requires any person subject to the UCMJ, to advise suspects of their rights before questioning them.[22] Article 31(b) does not require custody or a specific police relationship.[23] The only triggers are a relationship to the UCMJ and suspicion of involvement in a crime.

Applied literally, Article 31(b) could result in some unique and, perhaps, absurd situations. Consider a barracks incident in which Soldier A suspects his roommate, Soldier *B*, of stealing A's wallet. **A** plain text reading of Article 31(b) would require Soldier **A** to read Soldier ***B*** his rights before asking if ***B,*** in fact, stole A's wallet. This assumes, of course, that **A** has some rational subjective or objective basis to suspect *B* actually took the wallet.

The COMA would not require **A** to read *B* his rights.[24] Unless there is some special duty or rank relationship between A and *B*, the COMA is unwilling to apply the strict terms of Article 31(b).[25] Of course, under *Miranda*, a court would reach the same result if *A* and *B* were civilian roommates. No court would require one friend to read another his or her rights. The Supreme Court reaches this conclusion through the rules it created in *Miranda* and the cases that followed. Article 31(b) is a creature of Congress.[26] It predated the *Miranda*

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[19] *Miranda* requires governmental action to implicate the Fifth Amendment. For this reason, private persons are not required to issue the warnings. *See* CHARLES H. WHITEBREAD & CHRISTOPHER **SLOBOGIN,** CRIMINAL **PROCEDURE** § 16.05 (1986). The central premise of *Miranda* is that custodial interrogation by law enforcement creates an inherently coercive atmosphere. This atmosphere is not present when a private individual asks questions, even if the suspect is not totally free to go. *See* Arizona v. Mauro, 481 U.S. 520 (1987) (conversation between suspect and spouse not custodial interrogation). *See also infra* text accompanying notes 72-91.

[20] *Miranda*, 384 U.S. at 444. *See also* Berkemer v. McCarty, 468 U.S. 420, 421-22 (1984); *infra* text accompanying notes 92-121. Such an environment is one in which the subject of the questioning is not free to leave. *See generally infra* text accompanying notes 92-121.

[21] *See* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). *See also infra* text accompanying notes 122-46.

[22] *See* United States v. Wilson & Harvey, 8 C.M.R. 48 (C.M.A. 1953).

[23] The *plain* text requires warning from *all* persons subject to the Uniform Code of Military Justice. UCMJ art. 31(b).

[24] *See generally infra* text accompanying notes 217-62.

[25] *See, e.g.*, United States v. Jones, 24 M.J. 367 (C.M.A. 1987).

[26] Congress created the UCMJ under its constitutional authority to establish rules for the armed forces. U.S. CONST. art. I, § 8, cl. 13.

requirements by fifteen years.[27] The COMA reaches its conclusion on issuing rights warnings in the military through a tortured analysis that denies the basic roots of Article 31(b), which are common with *Miranda*—the Fifth Amendment of the United States Constitution.[28]

When the COMA came into existence in 1950, there was no *Miranda*. Therefore, the COMA had the opportunity to develop its own unique case law. In 1966, however, the Supreme Court handed down the *Miranda* decision. The COMA could have responded with a shift in Article 31 law, but declined to do so. Instead, the COMA has misapplied *Miranda* principles and successively narrowed the application of Article 31(b).[29] This article seeks to demonstrate the problems inherent in the current interpretation of this Uniform Code provision by the COMA. It presents a proposed alternative analysis applying principles consistent with the *Miranda* rules.

To date, the COMA has been reluctant to apply *Miranda* and its progeny to Article 31 situations.[30] Part of this reluctance comes, no doubt, from a well-founded principle of interpreting and applying statutory law rather than reaching a constitutional question. More of it may come from the COMA's desire to follow its own body of law rather than draw from the Constitution directly.

To analyze Article 31(b) in this light, we must review the history of both Article 31(b) and the Fifth Amendment under *Miranda*. In this regard, this article will first review the historical antecedents of the *Miranda* rules. It will then analyze *Miranda* itself to reveal why the Supreme Court took the bold step of judicially legislating a set of police practices. A review of the history after *Miranda* will focus on the tests the Supreme Court has applied to the "trigger" elements—custody31 and police interrogation.32 Finally, I will analyze the one clear exception to the *Miranda* rules, the so-called "public safety" exception under *New York v. Quarles.*

This article will then analyze the development of Article 31(b). It will initially review the military antecedents to Article 31(b) and the scant legislative history surrounding Article 31(b). It will then turn to an analysis of the COMA's treatment of Article 31(b). Before

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[27] Congress enacted the UCMJ and the President signed the legislation in 1950. Uniform Code of Military Justice, ch. 169, 64 Stat. 107 (1950) (codified as 10 U.S.C. §§ 801-946 (1988)). It became effective on May 31, 1951. *See* United States v. Wilson & Harvey, 8 C.M.R. 48, 54 (C.M.A. 1953). The Supreme Court decided *Miranda* on June 13, 1966. Miranda v. Arizona, 384 U.S. 436 (1966).

[28] *See generally infra* text accompanying notes 84-87 and 204-07.

[29] *See* Jeffrey L. Caddell, *Article 31(b) Warnings Revisited: The COMA Does A Double Take,* ARMY LAW., Sept. 1993, at 14, 16.

[30] *See, e.g.*, United States v. Loukas, 29 M.J. 385 (C.M.A. 1990) (COMA refuses to apply public safety exception of *Miranda*).

[31] *See infra* text accompanying notes 92-121.

[32] *See infra* text accompanying notes 122-46.

Miranda,[33] the **COMA** operated in *terra incognito* and was free to develop case law that was unique in American jurisprudence. After *Miranda,* the **COMA** had the opportunity to merge Article 31(b) law with the principles of *Miranda* to create a simple, coherent, body of rights warning law in the military. In *United States v. Tempia,*[34] the COMA appeared to move in that direction. However, it soon turned to an alternate analysis.

That alternate analysis is the current **COMA** test for Article 31(b) triggering situations. The test originated in *United States v. Duga.*[35] It is commonly referred to as the "officiality" test. Since *Duga,* the **COMA** has consistently narrowed the officiality test and consequently the scope of Article 31(b). The COMA followed this treatment in *United States v. Jones,*[36] *United States v. Quillen,*[37] and *United States v. Loukas.*[38] This review of Article 31(b) law will focus solely on the trigger elements regarding who must warn and the officiality test. It will then propose a new test for applying Article 31.[39] The new test will seek to harmonize the policies behind Article 31(b) with those of *Mirandu.*

11. The Law of Miranda v. Arizona

A. Introduction

One could debate the *Miranda* opinion. *Miranda* is a generally accepted part of American legal culture. If nothing else, the warnings have certainly become a fixture in most crime dramatizations![40]

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[33]The history of the Uniform Code and of Article **31** provides some insight into the purpose, intent, and meaning of the warning requirement. It is not, however, dispositive. **An** outstanding article by Manuel Supervielle in the *Military Law Review* some years ago amply describes the historical antecedents of Article **31.** *See* Manuel E.F. Supervielle, *Article 31(b): Who Should Be Required to Give Warnings?,* **123** MIL. **L.** REV. **151 (1989).**

3437 C.M.R. **249** (C.M.A. 1967).

[35] **10** M.J. **206** (C.M.A. **1981).**

[36]24 M.J. **367** (C.M.A. 1987).

[37]27 M.J. **312** (C.M.A. **1988).**

[38]29 M.J. **385** (C.M.A. 1990).

[39]*See infra* text accompanying notes **527-51.**

[40]*See, e.g.,* **DRAGNET** (Universal **1987)** (The character played by Tom Hanks asked the suspect to "sing along" with the rights warnings). Indeed, I suspect many Americans already know their so-called "Miranda rights."

> Miranda's story spawned an ongoing controversy familiar to anyone who has watched a television "cop"throw a television criminal against a studio wall and read four well-known warnings from a card while handcuffing the "bad guy" for the trip downtown. The so-called Miranda rights are the only legal doctrine accessible through an intellectual diet limited to prime-time television. Few cases have triggered as expansive a collection of case law and scholarly commentary, not to mention barroom, streetcorner, and living-room discourse.
>
> Daniel Yeager, *Rethinking Custodial Interrogation,* **28** AM. CRIM. L.REV. 1(1990).

I will not enter the debate over whether Miranda was the right response.[41] It is the law and it serves a distinct constitutional purpose of protecting the rights embodied in the Fifth Amendment.42

In the years since the decision, the Supreme Court has whittled away at the fringes of Miranda, and even created one or two exceptions or limitations.43 The Court never has attacked the core value of the decision—that of protecting the privilege against compelled self-incrimination.[44]

At the time of Miranda, however, many did debate its necessity and there were predictions of dire consequences for law enforcement.[45] The Supreme Court majority opinion did not try to state that it was merely applying old law. It admitted that the procedural safeguard of the Miranda warning was a creation of the Court.[46] The key to the opinion, however, was why the Supreme Court thought such a warning necessary.

The year 1966 was not the first time that the Court had analyzed the issue of compelled self-incrimination. The Miranda decision recites a brief history of the Court's treatment of the rights embodied in the Fifth Amendment.[47] Understanding the history before *Miranda* is significant because it also reflects the legal background against which Article 31 was created.

B. History

1. Early Common Law—The early history of the privilege against self-incrimination is cloudy. Legal historians and theorists have debated the exact origins of the privilege for years. Fortunately, for the purpose of this article, only a brief outline is necessary. Some trace the privilege as far back as Biblical times.[48] Others claim that it arose as a result of the practices of medieval

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[41] *See* New York v. Quarles, 467 U.S. 649, 660 (1984) (O'Connor, J., dissenting). *See also* Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

[42] *Quarles*, 467 U.S. at 654.

[43] *Id.* at 655. *Quarles* created the so-called "public safety" exception. Another doctrine referred to as the "attenuation of taint" doctrine is found in Oregon v. Elstad, 470 US. 298 (1985). It applies to the use of subsequent confessions obtained after a failure to issue the rights warnings. It creates a limit to the scope of the *Miranda* exclusionary rule. *Id.* at 318. This rule is not the focus of this article because it deals with events significantly after the initial interview.

[44] *See generally infra* text accompanying notes 92-146.

[45] *See, e.g.*, Miranda v. Arizona, 384 US. 436, 504 (1966) (Harlan, J., dissenting).

[46] *Id.* at 488-89. The only warning precedents were found in British, Indian, and American military law. *Id. But see id.* at 442 (holding is not an innovation).

[47] *See generally id.* at 442-44, 461-65.

[48] *See* MCCORMICK ON EVIDENCE § 114 (Edward W. Cleary *ed.*, 3d *ed.* 1984).

ecclesiastical courts.[49] Under the ecclesiastic system, for example, an accused could be forced to testify under oath. The judges could ask questions about the accused's involvement with the alleged offense.[50] Early English law courts followed the same procedure in criminal proceedings.[51] However, in 1648, this practice changed as a result of an act of Parliament.[52] The reform, however, only applied to trial procedure and did not extend outside the courtroom to police practices.[53] Early American law drew on the English tradition.

In his treatise on evidence, Professor Wigmore cites four distinct periods in the development of the American law of confessions. First, he cites the age before 1750, in which confessions were readily accepted. Second, was a period in the latter half of the 18th century. In this period, some confessions were rejected because of their untrustworthiness. The third period is the 19th century, in which courts went to extremes in rejecting confessions. The last period is the 20th century, in which courts applied constitutional principles to the law of confessions.[54] This last stage is our concern.

2. Constitutional Development—In its first confessions case, the Supreme Court adopted the common law rule of voluntariness as the federal standard.[55] Under the common law rule, a confession that was not obtained voluntarily was excluded. This exclusion was not a result of a constitutional provision, but was rather an evidentiary rule founded on a simple premise. **A** confession that was coerced was also likely to be unreliable. Therefore, an involuntary confession was deemed incompetent or weak evidence.[56]

In Bram *v.* United States, the Supreme Court tied the evidentiary privilege to the constitutional privilege.[57] In Bram, the Court

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[49] *See* generally **8** WIGMORE, EVIDENCE § **2250** (John T. McNaughton rev. 1961). See also generally Edmund Morgan, The Privilege Against Self-Incrimination, **34** MI''. L. REV. **1** (1949).

[50] *See* MCCORMICK, supra note 48, § **114.**

[51] Id.

[52] *Id.* Parliament acted in response to the plea of John Lilburn to have his sentence overturned because of a compelled confession before the Star Chamber. *Id.*

[53] *Id.* McCormick cites a considerable debate between Wigmore and other legal historians. Id. This debate would continue through to include the Supreme Court in *Miranda* itself.

[54] 3 WIGMORE, EVIDENCE § **817** (James H. Chadbourn ed., **1970).**

[55] Hopt v. Utah, **110** U.S. **574,585 (1884)** overruled *by* Malloy v. Hogan, **378** U.S. **1 (1964).** See also MCCORMICK, supra note 48, § **147.**

[56] The Supreme Court presents a treatise-like explanation of both the common law and constitutional history of the law of confessions in Bram v. United States, **168** U.S. 532, **541-61 (1897).** *But* see **8** WIGMORE, supra note **49,** § **252** (Wigmore cites **12** possible policies behind the privilege under both common law and the United States Constitution).

[57] "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is con-

ruled that custody was one factor, of many, to consider in determining if the confession was voluntary, and therefore, admissible.[58] Although the Court observed that this was not the rule in all states,[59] it refused to impose any rule on the states requiring compliance with its holding under the Fifth Amendment.

In *Bram*, the Court suppressed a confession given to a police officer while the suspect was in custody.[60] The police officer had Bram stripped and isolated in an interrogation room.[61] The officer confronted Bram with the allegations of another accused that Bram had committed a murder. The Court found that "[a] plainer violation as well of the letter as of the spirit of the constitutional immunity could scarcely be conceived of."[62] Therefore, for United States *federal* courts, the Fifth Amendment privilege was tied to the voluntariness of the confession.

The Supreme Court did not adopt the same rule for state trials until 1964. Rather, beginning in 1936 with *Brown v. Mississippi*,[63] the Court examined the police conduct to determine if it violated the due process clause of the Fourteenth Amendment.[64] Under this

trolled by that portion of the Fifth Amendment to the constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Bram*, 168 U.S. at 542.

[58] *Id.* at 558.

[59] The Court noted that in some states, notably Texas, the accused could only make a confession before a magistrate after being advised of the right to remain silent. *Id.* Other states had no such requirements and freely admitted statements made to police officers while in custody. *Id.* at 558-61.

[60] *Id.* at 565.

[61] The specific crime was murder on board an American ship at sea. *Id.* at 534-36. The crew suspected Bram of the crime based on the allegations of another suspect. When the ship docked at Halifax, Nova Scotia, Bram was turned over to Canadian authorities, who conducted an investigation. At trial, the United States sought, successfully, to introduce a confession to the Canadian investigator. *Id.* at 538-44.

[62] *Id.* at 564.

[63] 297 U.S. 278 (1936). The facts of *Brown* are truly shocking. The accused were described as "ignorant negroes." *Id.* at 281. As the case name notes, they were convicted of the crime of murder in Mississippi. The sole evidence against them was the confessions extracted from them by torture. *Id.* at 279. The case is a mockery of justice. The murder occurred on 30 March 1934. The accused were indicted on 4 April 1934 and by 6 April 1934 had been convicted and sentenced to death. Each of the accused testified to the beating that produced the confession to the crime. In a surprising development, the sheriffs deputy and two other persons who participated in the beating, all testified that they had beaten the accused. *Id.* at 279-84. The trial court and every state appellate court denied appeals to have the confessions suppressed. The United States Supreme Court reversed the conviction but specifically declined to do so on the basis of the Fifth Amendment. *Id.* at 285. In *Brown*, the Court tied the Fifth Amendment privilege to actual testimony in court by the accused. *Id.* The Court's decision rested instead on due process. *Id.* at 285-87.

[64] *See* MCCORMICK, *supra* note 48, § 147. *See also* WIGMORE, *supra* note 54, § 822(c). Wigmore found that these cases were stated in very general terms. As a result, there was no occasion for the courts to discuss the untrustworthiness rationale. *Id.* Wigmore further asserts that historically there never has been any connection

analysis, the test was whether the conduct of the police was so shocking as to give rise to concerns about the fairness of the proceeding in its entirety.[65] The Court followed this course until the 1964 case of *Malloy v. Hogan*.[66] In Malloy, the Court held that state and federal cases would follow the same analysis. The Court formally incorporated the Fifth Amendment privilege against self-incrimination into the Fourteenth Amendment.67

The analytical approach after *Malloy* was supposed to follow the federal standard of voluntariness.68 Starting with Bram, the Court had measured voluntariness by analyzing the totality of the circumstances surrounding the questioning. More importantly, starting with Bram, the Court attempted to quantify the degree of psychological pressure necessary to break down the will of the suspect. In Bram the Court stated, "the result was to place upon his mind the fear that, if he remained silent, it would be considered an admission of guilt."[69] The opinion quoted a contemporaneous text on criminal law that stated, "[tlhe law cannot measure the force of the influence used, or decide upon its effect on the prisoner, and therefore excludes the declaration if any influence has been exerted."[70] The Court refused to single out, however, any single fact from the circumstances surrounding the confession that would result in a finding of involuntariness. Rather, the Court stated that the sum of the facts, taken as a whole, led to the conclusion.[71]

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between the constitutional doctrine and the common law rule of confessions. *Id*. For this article, however, such a distinction is unnecessary. What is relevant is the state of federal law during the period 1900-51.

[65]*Brown,* 297 U.S. at 278, 286-87. The *Brown* court did not use the term "shocking," rather, the Court stated that the beatings which the accused received that produced the confessions were so fundamentally unfair that the entire proceeding against them was "a mere pretense of a trial and rendered the conviction and sentence wholly void." *Id*. at 286. The term "shocking" comes from Rochin v. California, 342 U.S. 165, 172 (1952) (conduct of police in pumping the stomach of a suspect violated the due process clause of the Fourteenth Amendment). The Court modified this approach in Mapp v. Ohio, 367 U.S. 643 (1961) (applying the Fourth Amendment to the states directly). *Rochin* actually was a search and seizure case, but the Court reached its conclusion suppressing the evidence by analogizing the state of compelled confession law. The Court said, "Use of involuntary confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency." *Rochin,* 342 U.S. at 173.

[66]378 U.S. 1, 8-9 (1964). At least one commentator has called *Malloy's* merger of the due process analysis with a Fifth Amendment analysis a "shotgun wedding." Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation,* 25 Ohio ST. L.J. 449, 465 (1964).

[67]*Malloy,* 378 U.S. at 6-7.

[68]*Id.* at 7.

[69]Bram v. United States, 168 U.S. 532, 562 (1897).

[70]*Id.* at 565 (quoting *Russell on Crimes).*

[71]*Id.* at 564-65.

Thus, the Court employed a test from *Bram* through *Malloy* that focused on the totality of the circumstances surrounding the confession. If voluntary, the confession was admissible. If involuntary, the confession was not admissible as violative of the privilege against self-incrimination in the Fifth Amendment. In each case, the Court had to conclude whether the specific facts of the case led to a conclusion, as a matter of constitutional law, that the confession was coerced.

C. The Case of Miranda v. Arizona

The use of the totality analysis ended only two years after *Malloy* with the *Miranda* decision. In *Miranda*, the Court abandoned the ad hoc analytical process it had followed in both the due process and voluntariness inquiries with a constitutional presumption. The Court refused to entertain evidence of subjective voluntariness. Instead, it concluded that certain circumstances led to a presumption of involuntariness. Only a series of prophylactic warnings would remove that presumption.

Miranda began with a review of the history described above. It then shifted to a review of a variety of police texts describing police interrogation techniques. The Court found these texts useful because they described subtle psychological techniques of extracting confessions.[72] The Court noted that the police had progressed from overt torture like that found in *Brown* to more subtle forms of compulsion.

The majority found that these techniques were carefully created to destroy the will of the individual to remain silent.[73] Reviewing the recent *Malloy*[74] and *Escobedo*[75] cases, the Court stated, "The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment."[76] The Court concluded that the only

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[72]Miranda v. Arizona, 384 U.S. 436,448-49 (1966).

[73]*See generally id.* at 445-58.

[74]Malloy v. Hogan, 378 U.S. 1 (1964). *Malloy* applied the protection of the Fifth Amendment to the states where previously only due process had controlled. *See* 3 WIGMORE, *supra* note 54, § 823.

[75]Escobedo v. Illinois, 378 US. 478 (1964) *partially overruled by* Miranda v. Arizona 384 U.S. 436 (1966), extended the Sixth Amendment right to counsel to pretrial proceedings. The Court used the same approach in *Miranda* and concluded that as a result of the manner in which police conduct their interrogations, the adversarial process has commenced and the Fifth Amendment was implicated. The Court held that rights to counsel found in ***Escobedo*** and the right to silence from *Malloy* are meaningless at trial unless protected from police overreaching during the investigation phase. *Miranda*, 384 U.S. at 466.

[76]*Miranda*, 384 U.S. at 465.

effective counterbalance to this coercion was a warning requirement. However, the critical trigger was custodial interrogation.

Why then is a custodial interrogation necessary for rendering a rights warning? The Court noted that since the 1930s the police had no doubt reduced their reliance on the "third degree."[77] The modern practice was a psychological approach, specifically designed to break down the resistance of a person to confess. It stated, "[T]his Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."[78] The police texts the Court reviewed specifically encouraged isolation of a suspect, hence custody. The whole goal, the texts suggested, was to place the police at a psychological advantage over the suspect. They noted that, "[h]e [the questioner] must dominate his subject and overwhelm him with his inexorable will to obtain the truth." [79]

The Court took these texts as representative samples from which to derive a clear picture of police practices.[80] The Court concluded by stating, "that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."[81] Furthermore, the Court reasoned that *custodial* interrogation is likely to wear down the will of the individual.[82] The Court concluded that "[t]he current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself."[83]

Thus, the Court's psychological analysis followed closely the approach it began in *Bram*. Instead of measuring the conditions surrounding the interrogation, however, the Court drew a line at a simple combination of elements. Police conduct amounting to interrogation in a custodial environment would give rise to a constitutional presumption of coercion.[84] The Court seemed to abandon the ad hoc due process and voluntariness approaches forever. Henceforth, the

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[77] *Id.* at 447.

[78] Blackburn v. Alabama, 361 U.S. 199, 206 (1960). The *Miranda* psychological analysis is critical because it relates closely to the analysis that the COMA uses in Article 31 cases. See *Mirunda*, 384 U.S. at 448. ***See*** *also infra* text accompanying notes 307-413.

[79] *Miranda*, 384 U.S. at 451 (quoting O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 112 (1956)).

[80] *Id.* at 455.

[81] *Id.* at 457.

[82] *Id.*

[83] *Id.* at 457-58.

[84] *Id.* at 444. The Court stated that statements made in custodial interrogation would not be advisable ***unless*** the prosecution proved that the procedural safeguards were followed. *Id.* This effectively presumed coercion absent proof of the procedural prophylactic.

Fifth Amendment would be protected not only at trial, but by special police procedures attendant to *custodial interrogation.*

The Fifth Amendment is the fundamental basis of the special treatment that the Court would give to custodial interrogation. Having thus established the policy supporting the warning requirement, the Court turned its attention to the procedures necessary to combat the presumed coercion. At the outset, the Court made it clear that the states were free to adopt any procedure more strict than those in *Miranda.*[85] Equally clear, however, were the rules that the Court would apply to analysis of all future confessions.

Significantly, the Court announced that it would refuse to analyze whether the individual did know, or already *should have* known, of the right to remain silent.[86] Therefore, the Court dismissed any attempt to prove that the individual had either a subjective or objective knowledge of his or her rights. The Court reached this conclusion by balancing the Fifth Amendment right against the newly imposed requirement to issue the warnings. It concluded that the right was so fundamental, and the warnings so easy to render, that it would not consider any allegation of prior knowledge on the part of the suspect.[87]

The Court identified another important reason for the warnings that merits additional analysis. As an initial matter, the Court concluded that custodial interrogation was the start of the adversarial process.[88] It noted, however, that the suspect may not be aware that he or she became engaged in an adversarial proceeding.89 Once again, reliance on the police texts gave the Court some support for this approach. The Court concluded that the warnings served to

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[85] *Id.* at **467.**

[86] *Id.* at **468.** The Court stated:

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

Id. at 468-69.

[87] *Id.* The Court balanced the fundamental right against what it viewed as a simple procedure. The only United States precedent that the Court found for the warnings was the UCMJ. *See id.* at **489,**

[88] *Miranda,* 384 U.S. at **466.**

[89] *Id.* at **469.**

announce the commencement of the adversarial process. The warnings would put the suspect on notice that the interrogator may not have the best interests of the suspect at heart, no matter what protestations to the contrary that the interrogator may make![90]

Therefore, the warnings serve two purposes. First, they act as a prophylactic against all forms of police coercion. Second they put the individual on notice that he or she is now participating in an adversarial system, not just a generalized inquiry for information about a crime.

Thus, the *Miranda* Court established "why" the police must issue warnings. Future opinions would establish exactly "when" the police would have to issue warnings. In its later cases, the Court established precise definitions of both custody and interrogation. For both triggers the Court would adopt an objective test for analyzing the trigger.[91] Finally, in establishing the one true exception to the *Miranda* rule, the "public safety exception," the Court also would employ an objective analysis.

The concept of due process voluntariness would not, however, be forever banished from Supreme Court jurisprudence. The *Miranda* prophylactic serves only as a gate keeper. In later years, the Court would identify situations in which the police, having issued the warnings, would still conduct themselves in a manner that violated due process. Additionally, due process would continue to function as a final guardian against government overreaching. However, throughout most of its cases, the Court would take great pains to separate the due process analysis from the *Miranda* prophylactic.

The article will now review the law surrounding the *Miranda* triggers, the exception to the *Miranda* exclusionary rule, and the split between due process and *Miranda*.

D. The Custody Digger

The first of the *Miranda* triggers is that the individual actually must be in custody. The test the Court has applied in every circumstance has been whether the individual actually was under formal arrest or had his or her freedom restricted in a fashion that was the functional equivalent of arrest.[92]

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[90] *Id.* "[H]e is not in the presence of persons acting in his interest." Id.

[91] *See generally infra* text accompanying notes 92-121 (custody) and notes 123-47 (interrogation).

[92] *See* Berkemer v. McCarty, 468 U.S. 420, 428 (quoting *Miranda*, 384 U.S. at 444).

Since 1966, the Court has addressed the custody trigger several times. With regard to interrogation, a range of possible circumstances exists describing custody. At one extreme, is the situation where the police inform the individual that he or she is under arrest, place the suspect in hand irons, and transport the suspect to the police station. Undoubtedly, not only the suspect, but virtually anyone observing the situation, would conclude that it represented custody.[93] The problem occurs at the other end of the spectrum. Specifically, what combination of more subtle police actions will constitute custody? More importantly, for Miranda purposes, what police actions will create the inherently coercive atmosphere necessitating the Miranda warnings?[94] To answer this question, the Supreme Court has examined several factual situations. Two cases arising from traffic stops for the offense of driving under the influence (DUI) demonstrate the Court's test.

In 1984, the Court decided the case of *Berkemer v. McCarty*[95] which came up as a habeas appeal from a state court conviction for DUI.[96] In this case, the Supreme Court held it would require Mirundu warnings for both misdemeanor and felony arrests.[97] More importantly, the Court clarified the actions that indicated the beginning of custody.[98]

An Ohio state patrolman stopped Richard McCarty for suspicion of driving while intoxicated. At the stop, the officer asked McCarty to get out of the vehicle. Noting the difficulty that McCarty had, the officer concluded almost immediately that he would arrest McCarty for DUI. The officer continued, however, to conduct the normal roadside procedure including field sobriety tests. He asked the respondent whether he had been using any intoxicants. McCarty responded that he had drunk two beers and smoked several marijuana joints. The officer then formally placed McCarty under arrest and transported him to the police station. At the station the policeman continued to question the respondent about both drinking and smoking marijuana. Significantly, at no point in the entire procedure did anyone inform McCarty of his rights.[99]

The Supreme Court held that all of the statements taken after McCarty was placed under formal arrest should be suppressed under *Miranda*.[100] However, McCarty also had asked the Supreme

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93 *See id.* at 434.
94 *Miranda*, 384 U.S. at 465; *Berkemer*, 468 U.S. at 437.
95 468 U.S. 420 (1985).
96 *Id.* at 424.
97 *Id.* at 434.
98 *Id.*
99 *Id.* at 423-24.
100 *Id.* at 434-35.

Court to suppress every statement made to the police during the traffic stop.[101] The Supreme Court denied this request and held that a traffic stop did not necessarily constitute custody.[102]

The Court returned to *Miranda* and focused on the purpose of the warnings. It noted the warnings were designed to counteract the pressures — inherent in a custodial setting — which impaired the free exercise of the privilege against self-incrimination. The Court found that two features of a traffic stop mitigated these concerns.[103] First, the Court found that these stops were presumptively temporary and brief. Drivers expect that they will only have to wait for a few moments, maybe answer a few questions, and then drive away (perhaps with a ticket). The Court contrasted this with the longer station house interrogation which may end only when the police get the "right" answers.[104]

The Court also found that the overall situation at the roadside reduced the coercive atmosphere.[105] Although it recognized that the driver was not free to leave until the officer released him or her,[106] and found that some degree of pressure resulting from the contact with an armed officer of the law existed,[107] the Court found that the public setting at the roadside severely diminished these pressures. It reasoned that a public setting was likely to *prevent* police officers from overreaching in their attempt to extract incriminating state-

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[101] *Id.* at 435 & n.22.

[102] *Id.* at 441-42.

[103] Fidelity to the doctrine announced in Miranda requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. Thus, we must decide whether a traffic stop exerts upon a detained person pressures that sufficiently impair his Gee exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

Id. at 437.

[104] *Id.* at 437-38.

[105] The second feature of a traffic stop that the Court found which mitigates the concerns in *Miranda* is as follows:

> [circumstances associated with] the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces.

id. at 438.

[106] *Id.* at 437-38.

[107] *Id.* at 438.

ments by any form of coercion.[108]

The Court focused its analysis on the factors reasonably known to the suspect. All factors noted above were extracted from the Court's recitation of the circumstances surrounding a roadside stop. The point of view in this analysis, however, was the perception of the suspect.[109] The Court specifically rejected evidence that the police officer had decided almost immediately that he was going to arrest McCarty.[110] The critical fact to the Court was that the officer never communicated this intent to McCarty until later in the procedure.[111] The Court concluded that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."[112]

The Supreme Court refused to look at the subjective reasons for action, or the subjective intent of the parties.[113] Beyond the cloak of simply protecting the Fifth Amendment privilege, the Court noted "an objective reasonable man test is appropriate because, unlike a subjective test, it is not solely dependent either on the self-serving declarations of the police officers or the defendant. . . ."[114] Additionally, earlier in the opinion the Court noted that the rules established in *Miranda* have the added protection of keeping courts out of a case-by-case determination of the voluntariness of the confession based on the totality of the circumstances.[115] This relieves the police from the burden of determining the frailties or sensitivities of every person that they question. If the Court were to have

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[108]The Court believed that a public setting was less police dominated. Id. at 438. The Court compared the roadside stop with the so-called "Terry" stop under Fourth Amendment law. The Court noted that it did not require warnings in *Terry* stops, finding that environment was comparatively non threatening. Id. In *Terry*, the Court held that a policeman with reasonable suspicion that an individual is engaged in criminal activity may stop that individual for a brief time period and ask him or her a limited number of questions. The police officer also may conduct a brief "pat down" of the individual to ensure that he or she is not carrying a dangerous weapon. The police need not have suspicion amounting to "probable cause" for an arrest or search. See generally Terry v. Ohio, 392 U.S. 1 (1968). In light of the widely-publicized Rodney King incident, some may doubt whether police feel restrained by the public setting of a roadside stop.

[109]*Berkemer*, 468 U.S. at 442.

[110]*Id.* at 441-42. The Court reaffirmed this position in Stansbury v. California, 114 S. Ct. 1526 (1994) on remand, 889 P.2d 588 (Cal. 1995), pet. cert. *den.*, 116 S. Ct. 320 (1995). In *Stansbury*, the Court stated, "We hold, not for the first time, that an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment of whether the person is in custody." Zd. at 1527.

[111]*Berkemer*, 468 U.S. at 443.

[112]*Id.*

[113]*Id.*

[114]*Id.* at 442 n.35.

[115]*Id.* at 430.

imposed a subjective test, the police would have to inquire into the person's subjective feelings and sensitivities before every confession.[116] Conversely, the Court would have had to analyze every police officer's motives and opinions of the circumstances surrounding the interrogation. The lack of precision in applying this type of test was one of the reasons that led the Court to adopt *Miranda*.[117]

In 1988, in Pennsylvania *v. Bruder*,[118] the Court revisited the custody issue in a strikingly similar factual context. In *Bruder,* the Court found that the procedures of the roadside stop and the field sobriety tests were not conducted in a custodial setting.[119] In a critical footnote, the majority again refused to consider the suspect's *subjective* appraisal that he was in custody based on one or more of the factors the Court analyzed as relevant in McCarty.[120] Specifically, the Court held that, while it might view a prolonged detention as evidence that the suspect was in custody, the subjective perception of the suspect in that situation is irrelevant.[121]

E. The Interrogation Digger

Custody alone, however, is insufficient to trigger Mirandu. As the Supreme Court held in Rhode Island v. *Innis*,[122] the unique interplay of custody and interrogation calls for the prophylactic of the warnings.[123] Although recognizing this interplay, and its effect on the psyche of the suspect, the Court refused to delve into that psyche beyond the level of the reasonable man.[124] Therefore, as with custody, the Court only analyzed objective factors defining the limits of "interrogation."

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[116] It is axiomatic that the accused at trial usually has the greatest incentive to lie. Therefore, it seems difficult to accept an accused's subjective perception as a reliable source of facts for a constitutional inquiry.

[117] *Berkemer*, 468 U.S. at 430. Later Court rulings, notably, *Quarles*, would criticize any retreat from this simplicity. *See generally infra* text accompanying notes 165-81.

[118] 488 U.S. 9 (1988) (*per curiam*).

[119] *Id.* at 11.

[120] *Id.* at 11 n.2.

[121] *Id.*

[122] 446 U.S. 291 (1980).

[123] *Id.* at 299. One writer suggests that the Supreme Court lifted this idea from the writings of Professor Kamisar. "Although the word 'interplay' did not appear in Miranda, the concept was gleaned from it in Rhode Island v. Innis, presumably after the justices or their law clerks read Professor Kamisar's 1978 article on interrogation, where the term first appeared." YEAGER, *supra* note 40, at 1. *See also* Yale Kamisar, *Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"? When Does It Matter?, in* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 139 (1980).

[124] *See Innis*, 446 U.S. at 301-02.

The Court's definition of interrogation has developed since Miranda, but, as with the custody trigger, has remained tied to an objective analysis of police actions, not the parties' subjective beliefs.[125] The Court currently defines interrogation as questioning initiated by law enforcement officers after a person is placed in custody.[126] The Court has noted that this definition, derived from Miranda, is susceptible to a full range of interpretation. It is possible to interpret this definition to include only explicit question and answer sessions.[127] However, the Court declined this literal analysis and focused on whether the police words or actions were reasonably likely to elicit an incriminating response. The Court has sought to narrow its focus on the objective facts of a case and avoid any plunge into actual beliefs or emotions.[128]

The Court first addressed interrogation directly in *Innis*.[129] In that case, the defense sought to suppress certain admissions made by the suspect, while he was riding in a police car, after being placed under arrest as a murder suspect.[130] The issue for the Court was whether the statements the policemen allegedly made to each other while riding with the suspect in the car constituted interrogation.[131] The Court ultimately held that the statements were not interrogation.[132] The Court applied an objective analysis of the circumstances in reaching this conclusion.

Innis was a suspect in the robbery and shotgun murder of a taxi driver. The police arrested Innis and read him his rights under Miranda. Innis asked for a lawyer. The police then placed the suspect in the back seat of a police sedan. Three officers drove Innis to the police station. Their captain ordered the officers not to question, intimidate, or coerce Innis in any way, while driving to the station.

On the way to the station, one of the officers remarked to another officer that he hoped that none of the children in the area would find the murder weapon—a shotgun—and harm themselves. (Apparently, there was a school for the disabled in the vicinity.) The two officers continued this conversation for several minutes. Innis then interrupted them and told them to turn the car around. He

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[125] *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582 (1990). In *Muniz,* the Court addressed the issue of interrogation in terms of the type of response demanded by an explicit question. Thus, a police officer's request for otherwise innocuous personal data can become a request for incriminating evidence.

[126] *Innis,* 446 U.S. at 298 (citing Miranda v. Arizona, 384 U.S. 436,444 (1966)).

[127] *Id.*

[128] *Id.* at 302.

[129] *Id.* at 298.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 303.

offered to show them where the gun was located. After returning to the scene of the arrest, the police captain again read Innis his *Miranda* rights. Innis responded that he understood the rights but wanted to help the police find the gun because of the children in the area. He then led the police to the gun.[133]

After his conviction for murder, Innis appealed to the Rhode Island Supreme Court. The Rhode Island Supreme Court held that the police had violated Innis's rights by interrogating him after he had invoked the right to an attorney. The Rhode Island Supreme Court found that he had been subject to subtle coercion that was the "substantial equivalent" of interrogation under *Miranda*.[134] The United States Supreme Court disagreed.

The Court began by reviewing the definition of interrogation outlined in *Miranda*. The Court noted that its definition might lead to a narrow analysis. *Miranda* "might suggest that the . . . rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody."[135] The Court rejected this literal approach, focusing instead on what it termed the "interrogation environment."[136] In this regard, the Court reviewed the various police practices that it had discussed in the *Miranda* opinion. It noted that in *Miranda* it had paid special attention to the "psychological ploys" that the police use to encourage confessions. The Court concluded "these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation."[137]

The Court held "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.[138] Express questioning is relatively easy to define. The problem remaining was the meaning of the "functional equivalent." To resolve this issue, the Court again looked to *Miranda* to determine the appropriate test.

The Court concluded that the test must be an objective one, based on the suspect's perceptions.[139] The Court refused to analyze

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[133]*Id.* at 293-95.

[134]*Id.* at 296. The Supreme Court noted that the state supreme court had relied on the case of Brewer v. Williams, **430 U.S. 387** (1977). That case is distinguishable on its facts from *Innis*. In Brewer, the police engaged in explicit, pointed, questioning in the form of the now-famous "Christian Burial Speech." *Id.* at 392. ***See*** WHITEBREAD & SLOBOGIN, ***supra*** note 19, § 16.08(b). This speech was targeted at a known sensitivity of the accused. ***Brewer,*** 430 U.S. at 392.

[135]*Innis*, 446 U.S. at 298.

[136]*Id.* at 299.

[137]*Id.*

[138]*Id.* at 300.

[139]*Id.* at 301.

subjective police motives or subjective perceptions held by the suspect. Rather, the Court would focus on the objective outcome that the words or actions of the police likely would produce.[140] Specifically, the Court held that any words or conduct that the police should reasonably know would produce an incriminating response from the suspect is the "functional equivalent" of interrogation.[141] The Court stated further that it was unwilling to make the police, and hence society, bear the burden of the "unforeseeable" results of all police words or actions around a suspect. Therefore, only the actions that an officer "should have known" would produce the incriminating response would constitute interrogation.[142]

Applied to the facts of Innis, the Court held that the police conversation was not an interrogation.[143] The Court found that the conversation "consisted of no more than a few off hand remarks."[144] Furthermore, the Court said "the officers should not have known that it was reasonably likely that Innis would so respond."[145] Two of the dissenters in the case disagreed with this finding. However, they agreed that the objective test that the Court announced was the correct analysis to apply to this *Miranda* situation.[146] The Court has continued to apply only objective analyses to the Miranda triggers.

F. The *Public* Safety Exception

The Supreme Court detoured from the narrow Miranda path in New York *v. Quarles*.[147] In that case, the Court created the so-called

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[140] *Id.*

> That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.

Id. at 310.

[141] Id. at 302.

[142] *Id.* at 301-02. Contrast the facts with *Brewer,* in which the police knew of a special sensitivity of the accused. Brewer v. Williams, 430 U.S. 387 (1977).

[143] *Innis*, 446 U S at 302.

[144] *Id.* at 303.

[145] *Id.*

[146] *Id.* at 305 (Marshall, J., dissenting).

[147] 467 US. 649 (1984).

"public safety" exception to the *Miranda* exclusionary rule. The Court held that it was permissible to admit a suspect's unwarned statement if the purpose of the police was to protect society from some objective threat.[148] In creating the exception, the Court struck a hard blow at the theoretical underpinning of *Miranda*. Although it did not explicitly overturn *Miranda*, it attacked some of the case's core principles. The Court's treatment of the core principles reveals the exact parameters of the Fifth Amendment privilege today. Unfortunately, the Court also removed, for a while, a substantial degree of doctrinal clarity that had existed in *Miranda* law.[149]

As a rule of criminal police procedure, the Supreme Court's actions in *Quarles* parallel some of the fundamental difficulties that the COMA has had with Article **31** law. In both situations, the Supreme Court and the COMA faced hard cases and made bad, or at best, very cloudy, law. To its credit, however, the Supreme Court retained an "objective test" for its analysis of the safety exception.[150] Unfortunately, the Court's "objective test" focused on the perceptions of the police or, perhaps, of society, and not the suspect.[151]

In *Quarles*, the suspect had fled from the scene of an alleged rape. The victim informed the police that Quarles was armed with a gun. The police followed Quarles into a nearby supermarket. The police entered the store, but Quarles ran away from them when they attempted to apprehend him. The police gave chase through the store, losing sight of Quarles for some moments. One policeman, Officer Kraft, eventually located Quarles and ordered him to place his hands over his head.[152]

The officer frisked Quarles and discovered that he was wearing a shoulder holster. The holster, however, was empty. The officer then asked the suspect where the gun was. Quarles nodded in the direction of a stack of boxes and said, "the gun is over there."[153] The police retrieved the gun. At trial on a weapons possession charge, the state sought to introduce both the statement of the suspect and the weapon.[154] The trial court and all New York appellate courts

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[148] *Id.* at 651. Writing for the majority, Justice Rehnquist noted that the *Miranda* Court "presumed that interrogation in certain custodial circumstances is coercion." *Id.* at 654.

[149] The majority acknowledged that they were reducing the doctrinal clarity. They accepted that police would be able to rely on their instinct. *Id.* at 658.

[150] *Id.* at 655-57. The Court refused to consider the "unverifiable motives" of the police. *Id.* at 656.

[151] *See infra* text accompanying notes 158-64.

[152] *Quarles*, 467 U.S. at 651-52. At this point, Quarles was certainly in custody. *Id.* at 653. *See also* Berkemer v. McCarty, 468 U.S. 420,443 (1984).

[153] *Quarles*, 467 U.S. at 652.

[154] *Id.*

excluded the evidence as violations of the accused's rights under *Mirandu.*[155]

The Supreme Court majority very carefully dissected *Miranda.* It ruled that technical *Mirandu* violations did not always rise to the level of compelled testimony that must be suppressed as violating the Fifth Amendment.[156] Although the Court recognized that the accused was in custody, it focused its inquiry on whether the confession was compelled in the sense of the "station house" confessions proscribed in *Mirunda.*[157]

The majority concluded that the confession was compelled, but for acceptable, limited reasons, was admissible.[158] It reached this conclusion by reasoning that the majority in *Miranda* was willing to accept certain social costs as a result of the warning requirement. The Court concluded that the cost the *Miranda* Court had been willing to bear was the loss of the confession at trial.[159] The Court distinguished that cost from the social cost that might have occurred had the gun not been found. In an intriguing footnote, the Court noted there was no evidence of *actual* coercion.[160] This was a startling appeal back to pre-*Miranda* due process analysis. This cut the core from *Miranda* by stating that a confession was *not* presumptively involuntary without the warnings. It is consistent, however, with the remainder of the majority's analytical approach because of the Court's focus on the police officersrather than the suspect.

The Court recognized that police officers are, and have been, affected by the ruling in *Miranda.*[161] It accepted that, as a result of *Miranda,* a police officer might have to decide whether to issue the warning and, potentially, still the suspect's tongue, or ask the question and risk suppression at trial.[162] The Court held that police should not have to make that sort of cost-benefit analysis in the fast-moving arrest scenario. Instead, the Court relaxed the proscriptive rule of *Mirandu* in situations presenting a safety risk to either the police officer or society as a whole.[163] The Court continued, however, to apply an objective standard in determining whether the exception applied. Significantly, the Court rejected the notion that the police-

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[155] *Id.* at 651-53.

[156] *Id.* at 653-56. There was no claim of "actual" compulsion. *Id.* at 655-56.

[157] *Id.* at 654 & nn.3, 4. (Court concluded it had the power to relax the judicial strictures of *Miranda* and attempts to tie that case to station house settings only).

[158] *Id.* at 657-58.

[159] *Id.* at 657.

[160] *Id.* at 655 n.5.

[161] *Id.* at 657-58.

[162] *Id.*

[163] *Id.*

man's subjective intent was relevant. Indeed, the Court noted that one of the likely reasons for the question was to gather evidence.[164] This reason, however, was not an objective indicator of a threat to public safety.

The Court's "public safety" exception in *Quarles* has received considerable criticism [165] beginning with a sharp dissent. The dissent by Justice Marshall and the concurring opinion by Justice O'Connor both attack the Court's reasoning and application of *Miranda*. Acommon point is that the new decision eliminated the clarity of the *Miranda* opinion.[166] Justice O'Connor wrote that" [tlhe end result will be a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence."[167] Both the concurrence and the dissent also found that the clarity of *Miranda* was one of its "core virtues."[168] The *Quarles* court abandoned that virtue in pursuit of what it saw as a higher societal goal.

Both Justice O'Connor's concurring opinion and the dissent assert the majority's support for a cost-benefit analysis approach as a significant error. Again Justice O'Connor wrote:

> The critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the state. *Miranda*, for better or worse, found the resolution of that question implicit in the prohibition against compulsory self-incrimination and placed the burden on the State.[169]

The dissent further criticized the majority's objective test.[170] The dissent asserted that the majority's test was a subterfuge for

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[164] *Id.* at 655-57. "Undoubtedly most police officers, if placed in Officer Kraft's position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect." *Id.* at 656.

[165] *See generally* Daniel Yeager, Note, *The Public Safety Exception to Mirandu Careening Through the Lower Courts*, 40 FLA. L. REV. 989 (1989).

[166] *Quarles*, 467 U.S. at 644 (O'Connor, J., concurring); *see also id.* at 678 (Marshall, J., dissenting).

[167] *Id.* at 663-64.

[168] The term "core virtues of simplicity" in *Mirandu* usage actually comes from an opinion by Justice Rehnquist. Fare v. Michael C., 439 U.S. 1310, 1314 (1984) (Rehnquist, J., in chambers) (cited in *Quarles*, 467 U.S. at 664) (O'Connor, J., concurring).

[169] *Quarles*, 467 U.S. at 664.

[170] *Id.* at 676.

inquiry into the subjective intent of the arresting officer.[171] There is a considerable air of truth in this assertion, especially given the facts related by the dissent. Apparently, Officer Kraft testified that the situation was under control when he asked where the gun was located.[172] Furthermore, the accused already had been "reduced to a condition of physical powerlessness."[173] The majority's suggestions of threats to public safety were not supported by the record. There was no one in the store except store employees as the arrest occurred after midnight.[174] Furthermore, while the majority suggested that an accomplice could have come across the weapon, the record fails to indicate the existence of any accomplice.[175]

Another criticism of the decision is its appeal to the older due process analysis.[176] Recall that under this analysis, the Court examined all of the surrounding circumstances to determine whether a confession was voluntary. One of the keys of *Miranda* was that the Court refused to continue this analysis. Instead, the *Miranda* Court substituted a constitutional presumption of coerced custodial interrogation.[177] The majority in *Quarles* agreed that the accused was in custody, yet still found that the confession was not actually coerced.[178] More disturbing, however, is the suggestion that coercion is desirable to protect public safety.[179] In stark contrast to *Miranda*, the majority found the confession admissible simply *because* it was vital to public safety.[180] Therefore, for the majority, there was an acceptable level of governmental coercion.

While the majority weakened *Miranda's* protection, it maintained a facially objective approach to the analysis. The weakness of the decision, however, is that it focused, for the first time, away from

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[171] *Id.*

[172] *Id.* The lower courts had made specific factual findings that there were no exigent circumstances. *Id.*

[173] *Id.* at 675.

[174] *Id.* at 676.

[175] There was never any hint of an accomplice in the case. The rape prosecutrix apparently only alleged one assailant — Quarles. *Id.* at 651. Thus, the Supreme Court's fear of an accomplice is made from whole cloth.

[176] *Id.* at 680-81.

[177] This is the presumption that the majority attempts to reject. *Id.* at 654. *See also id.* at 683-84. (Marshall, J., dissenting) (Court created a constitutional presumption in *Miranda*).

[178] *Id.* at 654-55.

[179] The Court implies this by admitting that the *Miranda* warnings may well have silenced the suspect. *Id.* at 657. "In such a situation, if the police are required to recite the familiar Miranda warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in Miranda. . . ." *Id.*

[180] *Id.*

the perceptions of the accused.[181] Prior *Miranda* interpretations had concentrated solely on the psychological pressure on the accused. However, in *Quarles*, the Court gave weight to the cost or pressure that *Miranda* warnings placed on society. With this decision, the Court appeared to retreat from the full protection afforded by *Miranda*.

G. Miranda Today

In 1993, the Supreme Court returned some of what it took away in *Quarles* and provided additional clarity to the *Miranda* rules. In *Withrow v. Williams*,[182] the Court established an analytical framework that again separated the due process analysis from the *Miranda* presumption.[183] Although the case is not specifically a *Miranda* case, the holding should apply to future situations.

The case came to the Supreme Court as a *habeas corpus* appeal from a circuit court. The issue that the petitioner raised was a violation of *Mirandu* by the state criminal court.[184] The federal district court, however, found a due process violation on its own motion and granted the *habeas* relief. The Supreme Court held that the district court properly entertained the *Miranda* issue raised by the petitioner, but had improperly ruled on the involuntariness issue without a hearing.[185] Important to the issue of the *Miranda* triggers, the Court held that, while *Miranda* and the due process analysis both protect the Fifth Amendment, they do so in different fashions.[186] The Court returned to a pre-*Quarles* posture, setting up the *Miranda* warnings as a constitutional prophylactic. Therefore, the Court returned to two distinct analyses. Absent the *Miranda* warnings that were required by the custody and interrogation interaction, the Court would suppress a confession. Other police conduct, however, issued after the warnings, or actions by nonpolice agents, may give rise to a due process voluntariness issue. It appears, therefore, that the Court has backed away, at least to some extent, from

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[181] The Court acknowledged that it was allowing the police to follow ***their*** natural instincts. Id. at 659. All prior *Mirundu* decisions had focused exclusively on reasonable reactions of suspects to a given set of circumstances. ***See*** *supra* text accompanying notes 109-16, 138-46.

[182] 113 S. Ct. 1745 (1993).

[183] Compare the Court's due process analysis with the origin and distinct place of *Miranda* relative to the Fifth Amendment. *Id.* at 1751-52.

[184] *Id.* at 1749.

[185] *Id.* at 1755-56.

[186] *Id.* at 1754-55. "We thus fail to see how abdicating *Miranda's* bright-line (or, at least, brighter-line) rules in favor of an exhaustive totality-of-the circumstances approach on habeas would do much of anything to lighten the burdens placed on busy federal courts." *Id.* at 1754.

applying a totality of the circumstances and the connected due process analysis to pure *Miranda* litigation.[187]

This separation is important as it mirrors one of the problems of the COMA's analyses in Article 31 situations. According to *Withrow,* arguably every confession case may contain issues regarding both the warning requirement and the voluntariness requirement. A different test arises, however, depending on the specific issue raised. In the UCMJ, this division of issues is found in two separate sections of Article 31. Article 31(b), the subject of this article, contains the warning requirement.[188] Article 31(d), on the other hand, contains the voluntariness requirement.[189] At present, both the Supreme Court and the UCMJ separate them; so should the COMA.

III. Article 31(b)

A. *Legislative History*

The legislative history of the UCMJ does not provide significant background about the purposes behind Article 31(b). The UCMJ itself grew out of an initiative by Secretary of Defense Forrestal to create a uniform military judicial code.[190] One of the primary forces driving this development was the creation of the Department of Defense. With the new cabinet agency over the Army Navy, and the new Air Force, and with the "discovery" of joint operations during World War 11, a joint service judicial code made sense.[191]

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[187]Justice O'Connor, concurring in part and dissenting in part, expressed discomfort with this move. She confirmed that the critical analysis under *Miranda* is whether the individual is in custody and whether that individual is being interrogated. *Id.* at 1759, 1764 (O'Connor, J., dissenting in part and concurring in part). She would use these as pieces of a totality of the circumstances test rather than as triggers resulting in a constitutional presumption of coercion. This would have the effect of returning Fifth Amendment law to pre-*Miranda* days when the warnings were but one of a number of factors the courts used to analyze a confession. *See generally* Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedures in* CRIMINAL JUSTICE IN OUR TIME 1, 47-49 (Howard ed., 1965) *(cited in* 3 WIGMORE, *supra* note 54, § 823n.5).

[188]UCMJ art. 31(b) (1988).

[189]*Id.* art. 31(d). "No statement obtained from any person in violation of this article, or through use of coercion, unlawful influence, or unlawful inducement may be received against him in trial by court-martial." *Id.*

[190]*See, e.g.,* 1 JOHNATHAN LURIE, ARMING MILITARY JUSTICE, THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, at 150-54 (1992).

[191]*See, e.g.,* EVERETT, *supra* note 17, at 8-9.

Secretary Forrestal appointed a committee, chaired by Professor Edmund Morgan of Harvard University, to prepare the new uniform code proposal. The committee consisted of several working members.[192] Perhaps most prominent among those members was Felix Larkin of the Office of General Counsel of the Secretary of Defense.[193] Mr. Larkin eventually provided substantially all of the testimony before Congress regarding Article 31. Mr. Larkin's uncontradicted testimony is almost the only legislative history surrounding the congressional intent of Article 31.[194] This is particularly interesting considering the strength with which the COMA argues the clarity of legislative intent in its pronouncements regarding Article 31.[195]

Article 31's precursors were Article of War 24 and Article 42(a) of the Articles of Governance of the Navy. In creating Article 31(b), the code committee explicitly extended the coverage of Article of War 24. Article of War 24 had been revised and extended, just one year earlier, by the 1948 Elston Act.[196] Article of War 24's evolution into Article 31 is a remarkable story.

Prior to 1917, military law had no rights warning requirement. The 1920 *Manual for Courts-Martial* suggested that an investigator should inform service members of their rights before questioning.[197]

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[192]The working group consisted of Felix Larkin, Assistant General Counsel of the Department of Defense, Colonel John P. Dinsmore, Office of Legislative and Liaison Division, Department of the Army, Lieutenant Colonel John M. Pitzer, Office of The Judge Advocate General, Department of the Army, Colonel John E. Curry, Office of The Judge Advocate General, Department of the Navy, Colonel Stewart S. Maxey, Office of The Judge Advocate General, Department of the Air Force, and Commander Halmar J. Webb, Legislative Counsel-Coast Guard, Department of the Treasury. Uniform Code of Military Justice, Text References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense i-ii (1950) [hereinafter Morgan Draft].

[193]*Id.*

[194] General Green, The Judge Advocate General of the United States *Army,* testified that in his opinion Article 31, as proposed, abridged the protection of Article of War 24. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 260-61 (1949) [hereinafter UCMJ Hearings]. He also expressed concern that a confession to a civilian police officer would still be admissible. *Id.* at 265. Colonel Melvin Maas, national president of the Marine Corps Reserve Association, testified that Article 31 should be limited to assertions of constitutional rights. *Id.* at 712. The statement of Robert L'Heureaux, Chief Counsel of the Senate Banking Committee indicates he believes that Article 31 may allow for admission of evidence that Article of War 24 would not. *Id.* at 816.

[195]*See, e.g.,* United States v. Duga, 10 M.J. **206,** 208 (C.M.A. 1981); United States v. Gibson 14 C.M.R. 164, 170 (C.M.A. 1954).

[196]*See* Supervielle, *supra* note 33, at 176.

[197]Compare the language of paragraph 225(b) of the 1921 *Manual for Courts Martial* with the language of the Elston Act. From 1921 through 1949, the *Manual* stated:

The 1948 Elston Act changed this suggestion to a duty.[198] The warning, however, only applied to an accused. The use of the term "accused" is significant, for it generally indicates a person who already had been charged. Accordingly, an ***accused*** service member is formally engaged in a phase of the trial process. Indeed, in the hearings on the Elston Act, Congress expressed an explicit intent that service members on trial should enjoy the same rights as civilians then enjoyed.[199]

The Code provision drafted by the UCMJ committee expanded on the protection that existed under the Elston Act.[200] It explicitly extended the privilege against self-incrimination outside the courtroom to persons who were merely "suspects."[201] It continued the requirement of the 1948 Elston Act, establishing a duty of the person obtaining the statement to advise about the right to remain silent.[202]

Unfortunately, while making these momentous changes, neither Congress nor the committee explained the broad sweep of the language that they used in the Article. Sadly, the testimony on Article 31 fits into ten pages of the House Record.[203] Over half of that volume concerns Article 31(c), not Article 31(b).[204] In explaining why the committee created Article 31(c), however, Felix Larkin ended up explaining Article 31(b).

> Considering the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, ***it devolves upon an investigating officer, or other military superior, to warn the person investigated*** that he need not answer any question that might tend to incriminate him.

MANUAL FOR COURTS-MARTIAL, United States, ¶ 22j (rev. ed. 1921)(emphasis added).

[198] Article of War 24 was changed to read:

> The use of coercion or unlawful influence in any manner whatsoever by any person to obtain any statement, admission or confession from any person or witness, shall be deemed to be conduct to the prejudice of good order and discipline, and no such statement, admission or confession shall be received in evidence by any court-martial. ***It shall be the duty of any person in obtaining any statement from an accused to advise him*** that he does not have to make any statement at all regarding the offense of which he is accused or being investigated, that any statement by the accused may be used against him in a trial by court-martial.

Act of June 24, 1948, ch. 625 § 214, 61 Stat. 628, 631 (emphasis added).

[199] UCMJ Hearings, ***supra*** note 194, at 2044.

[200] ***See*** Commentary to Article 31, Morgan Draft, ***supra*** note 192, at 47.

[201] *Id.*

[202] *Id.* ***See also*** Supervielle, ***supra*** note 33, at 176.

[203] UCMJ Hearings, ***supra*** note 194, at 984-86, 988-91.

[204] *Id.* at 986.

The congressmen were experiencing considerable difficulty deciding what a "degrading" question was under the proposed Article 31(c). The colloquy that ensued between Larkin and Members of the House sub-committee is instructive of the clear purpose and policy behind the counterpart, Article 31(b):

> Mr. Elston. I think it gives too much protection. It enables the guilty person to escape.
>
> Mr. Larkin. Well in the same way providing an obligation to inform him before he speaks is more than the usual protection.
>
> Mr. Brooks. You mean the constitutional provision?
>
> Mr. Larkin. So far as incrimination is concerned.
>
> Mr. Elston. That is all right. That is up above.
>
> Mr. Larkin. That is right.
>
> Mr. Elston. That is subsection (b). That is perfectly all right.[205]

This discussion reveals that both Mr. Larkin and the committee viewed the warning requirement of subsection (b) as affirming the constitutional right.[206] The constitutional right was the "usual protection."[207] The warning requirement, however, was more than the usual protection. It was an additional safeguard above the requirements of the constitution. It was grounded, however, in the constitutional right.

Another portion of the hearings provides some additional insight into the purpose of Article 31. It is the only guidance that exists about the context in which Congress and the committee perceived the rights warning would become relevant.

The first portion of Article 31 changed the existing law and took Article 31 out of a unique court-martial context.[208] Article 31(b) applied to *suspects*. Article of War **24** only applied to the accused.[209] The change in terminology made it clear that the privilege no longer was tied solely to court proceedings, but extended well into the investigatory phase of a case.[210] **An** issue arose during the hearings,

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[205]*Id.* (emphasis added).

[206]*Id.*

[207]*Id.*

[208]*See* Article **31,** Morgan Draft, commentary, *supra* note 192, at **47.**

[209]*Id.*

[210]UCMJ Hearings, *supra* note 194, at 988.

however, regarding the limits of the extension.[211] The hypothetical posed in the introduction to this article—of the soldier with a stolen wallet and his roommate—illustrates a possible worst-case scenario. The following colloquy shows that both the congressmen and the committee envisioned only an official investigatory setting:

> **Mr.** Brooks. How would a person know he was suspected of an offense?
>
> **Mr.** Larkin. Well, after an offense has been committed a number of persons who are suspected might be brought in for questioning none of whom have been accused because the evidence is not complete enough to indicate who the perpetrator may be.
>
> Mr. Brooks. But you can't interrogate him without first informing him of the nature of the accusation.
>
> Mr. Larkin. That is right. You would have to tell him that the crime of larceny has been committed, for instance. You could say that this is an inquiry in connection with it and that you intend to ask him questions about it, but that he should be informed that he does not have to make any statement about it.
>
> All that does is broaden the protection against self-incrimination so that whether a person is actually the accused and you attempt to interrogate him or whether you just don't know who the accused is and there are five or six people whom you suspect they are all protected.[212]

Note the language that both **Mr.** Brooks and **Mr.** Larkin used. They employed terms such as "offense," "brought in for questioning," "evidence," "inquiry," and "accused." These are all terms that, at least, strongly *imply* an official criminal investigation into a person's conduct.[213] The discussion that came just a few moments later confirms the official criminal nature of the inquiry:

> **Mr.** DeGraffenreid. **As** I understand it Mr. Larkin, is this what you have on your mind: Say a crime is committed and several people are suspected but no one has been arrested.
>
> **Mr.** Larkin. Yes
>
> Mr. DeGraffenreid. You bring them in before they have

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[211] *Id.* at 984-85, 991-93.

[212] *Id.* at 990.

[213] *See* John B. McDaniel, ***Article 31(b) and the Defense Counsel Interview,*** ARMY **LAW.,** May 1990, at 9 n.4.

been arrested.[214]

These words all imply some degree of superior authority. The UCMJ vests arrest authority only in persons of higher rank, or those in military police (MP) roles. Additionally, a soldier might "investigate" his or her buddy; he or she may even conduct an "inquiry." It stretches congressional intent beyond all reason, however, to suggest that they would go further and "arrest" that buddy absent some sort of official relationship between the two.

The House Committee made only one change to Article 31 as submitted.[215] There are other references to Article 31 in various comments submitted to Congress.[216] They do not, however, shed any additional light on the scope of Article 31 other than that it was intended to expand on Article of War **24.** The newly created COMA would have to flesh out Article 31 in its practice.

B. Early Developments at the *COMA*

The COMA first addressed the meaning of Article **31** in its decision in United States v. Wilson and *Harvey*.[217] Barely two years after the effective date of the UCMJ, the COMA held that Article 31(b) was as plain as any legislation could be.[218] It applied a simple analysis, looking first to Article **2,** UCMJ (Jurisdiction), then without further elaboration, at whether the accused was a suspect.[219] It found that Article 31 applied and suppressed the admission. In so doing, it created an interesting precedent.

The case arose from a prosecution for premeditated murder in Korea. **An** MP responded to the report of a murder. When he arrived at the scene, some Koreans pointed out a group of nearby soldiers standing around a fire. They said that the persons who shot the victim were in that group. The MP walked up to the group, looked directly at Wilson and Harvey and asked who had done the shooting.[220] Wilson and Harvey responded that they had shot the man. At no time did the MP read them their rights under Article

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[214]UCMJ Hearings, *supra* note 194, at 990.

[215]They removed the words "at all" from the phrase "he does not have to make any statement at all." ***Id.*** at 992.

[216]***See supra*** note 194.

[217]8 C.M.R. 48 (1953).

[218]"Those provisions [Articles 31(b),(d)] are as plain and unequivocal as legislation can be." *Id.* at 55.

[219]***Id.***

[220]The facts of the situation mirror the scenario envisioned by Felix Larkin in his congressional testimony. ***See supra*** text accompanying note 212.

31(b) or Article of War 24.[221]

The COMA had to differentiate between an admission and a confession.[222] Recall that in 1951, the voluntariness doctrine was a central feature of American federal confession jurisprudence. Under this doctrine, the prosecution had the burden of showing the voluntariness of a confession. The defense, however, had the burden of showing the *involuntariness* of an admission. Most notable in this regard, the COMA found that "there is not a scintilla of evidence in the record to indicate that these admissions were not in fact voluntary."[223] However, one must remember that with both Article of War 24 and Article 31(b), voluntariness is not the sole factor in analyzing the admissibility of a confession. The COMA correctly noted that voluntariness was separate from the warning provision of Article 31(b).

The COMA concluded that Article 31(b) applied to this case.[224] It reached this conclusion by a plain text reading of the relevant provisions of Article 31(b) and (d) and found that "[t]hose provisions are as plain and unequivocal as legislation can be."[225] The COMA's only analysis was to consider whether the MP was a person subject to the Code and whether the accused were suspects.[226] The COMA concluded that the MP was covered by Article 2, UCMJ. It then stated, without further elaboration, that the appellants were suspects. Therefore, the COMA concluded that Article 31(b) applied.[227]

After making these conclusions, the COMA justified its departure from prior law by discussing the legislative history of Article 31. It cited the House reports and simply noted that Article 31 was designed to protect not only the accused, but also suspects.[228] Furthermore, the COMA declared that it would support the protection that Congress gave to soldiers in extending the right.[229] In a back-handed slap at Congress, however, the COMA stated, "It is, of course, beyond the purview of this Court to pass on the soundness of the policy reflected in those portions of Article 31, supra, which extend the provisions of its comparable predecessor, Article of War 24. . . ."[230]

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[221] This investigation occurred some 51 days before the effective date of the Code. The accused were arraigned after the effective date, consequently the Code applied to them. United States v. Wilson and Harvey, 8 C.M.R. 48, 54-56 (C.M.A. 1953).

[222] *Id.* at 54.

[223] *Id.*

[225] *Id.* at 55.

[226] *Id.*

[227] *Id.*

[228] *Id.* at 54.

[229] *Id.*

[230] *Id.*

Having concluded that the admission was improperly admitted, the COMA then addressed the issue of whether it had to reverse the murder conviction. Here the COMA decided that the "element of officiality'' surrounding the admission was more than just a naked violation of Article 31(b).[231] As such, the violation struck at the very core of the policy behind Article 31(b) and consequently, was inherently prejudicial. Finally, the COMA noted that its decision conformed with prior decisions of the courts and boards implementing Article of War **24.** However, this part of the decision is the only part that mentions the official nature of the interrogation.[232] Considering future COMA cases, this decision is startling.

The dissent by Judge Latimer presaged later COMA law.[233] Judge Latimer flatly rejected the plain meaning approach that the majority took in applying the Article[234] and instead suggested a three-part analysis to determine if an individual must read a suspect his or her rights.[235]

Judge Latimer agreed that Congress intended to extend Article of War **24.** However, he believed that Article 31 was not intended to extend so far as to prevent all "legitimate inquiries."[236] Although Judge Latimer did not cite Felix Larkin's House hearing testimony, he analyzed the words used in Article 31(b) in a similar fashion.[237] He noted that a suspect must be told of the nature of the accusation. Without any knowledge about a crime, an investigator would have difficulty informing the suspect anything about the crime. Judge Latimer would, therefore, place some threshold limits on the necessity of rendering the rights warnings.[238]

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[231]The court specifically used the phrase "element of officiality."Id. at **55.**

[232]The Supreme Court adopted a harmless error analysis for coerced confessions in Arizona v. Fulminante, 499 U.S. 279, 306-12 (1991). Whether this will apply directly to Miranda situations is unclear. Because Miranda is a subset of the world of coerced confessions, arguably it should.

[233]*See* infra text accompanying notes 253-98. See *also* Supervielle, supm note 33, at 197.

[234]*Wilson and Harvey,* 8 C.M.R. at 60 (Latimer, J., dissenting). He said:

> [T]he section cannot be construed to apply to every person who happens to be asked a question concerning an offense possibly committed by him nor to every person subject to the Code who interrogates another. Congress undoubtedly intended to enlarge the provisions of Article of War **24,** supra, but I do not believe it intended to go so far as to prevent all legitimate inquiries.

Id.

[235]*Id.* at 61.

[236]*Id.* at 60.

[237]*Compare* id. with the history described supra at notes 208-16.

[238]*Wilson* and *Harvey,* 8 C.M.R. at 61.

In exploring these limits, Judge Latimer suggested a three-part test. First, the party asking the questions should occupy some official position in relation to crime detection or law enforcement. Second, there must be some sort of official investigation underway. Finally, the facts must be developed sufficiently that the questioner has reasonable grounds to suspect a person of the offense.[239] This analysis became the core of the COMA's later development of the "officiality"test.

C. The OfficialityTest

1. United States v. Gibson—The COMA returned to the issue just one year later in *United States v. Gibson*[240] and rendered an opinion almost totally opposite to *Wilson and Harvey.* In *Gibson,* the COMA found an excuse to expand the clear legislative intent and restrict the application of Article 31. Citing "judicial discretion,"[241] the COMA denied application of Article 31(b) to situations "wholly unrelated to the reasons for its creation."[242]

Gibson is correct, but only as applied to the facts of the case and when considered against the greater landscape of constitutional confession law existing in 1954. It also probably would be correct if decided today under *Mirunda* law.[243] The problem with the decision, and the rationale that the COMA employed, is that both went too far, The analysis that the COMA used gave too much latitude to future courts at the expense of the rights protected by Article 31(b).

Gibson was a suspect in the larceny of money from coin vending machines at Fort Sill, Oklahoma. He was a member of a guard detail at the motor pool where the vending machines were located. Shortly after the larceny, Gibson's superiors found out that he had a large number of coins in his possession. He was placed in pretrial confinement. The police placed another soldier in the cell with Gibson. This other soldier was a reliable jailhouse informant. During their time together, the other soldier succeeded in securing

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[239]*Id. See also* Supervielle, ***supra*** note 33, at 195.

[240]14 C.M.R. 164 **(C.M.A.** 1954).

[241]*Id.* at 170.

[242]*Id.*

[243]***See generally*** Arizona v. Fulminante, 499 U.S. 279 (1991) (Court does not disapprove of jailhouse informants, but does submit confessions to a due process-voluntariness inquiry); Illinois v. Perkins, 496 **U.S.** 292, 296 (1990) *(Mirunda* only applies when the concerns expressed therein are present—coercive atmosphere; coercion measured from perspective of suspect). ***See also*** Kuhlman v. Wilson, 477 U.S. 436 (1986); Hoffa v. United States, 385 US. 293, **304** (1966) (approving use of informant).

an admission from Gibson that he had stolen the money. The other soldier never read Gibson his rights under Article 31(b).[244]

Although the COMA upheld *Gibson* and ruled that Article 31(b) warnings were not required,[245] it was sharply divided over the rationale supporting the decision. Judge Quinn, the Chief Judge, authored the opinion and his analysis focused heavily on elements surrounding the voluntariness of the confession.[246] The COMA accepted that the accused was *subjectively unaware* that the cell mate was working for the police when he questioned Gibson. Chief Judge Quinn recognized that they were coequals and conducted a detailed analysis of military involuntariness.[247] Citing a Board of Review decision from 1947,[248] Chief Judge Quinn noted the important place that disparity of rank held in military confession law.[249] In that case, the board implied a *presumption* of involuntariness when a person of higher rank obtained a confession from a subordinate.[250] Chief Judge Quinn extrapolated the principle and found there was no rank coercion placed on Gibson.[251] His cellmate was merely another soldier in the same circumstances.

Chief Judge Quinn also relied on the testimony given Congress at the time of the 1948 Elston Act.[252] There he noted that rank was not the only coercive factor that concerned Congress. He stated that Congress adopted a view from civilian jurisprudence that the confession had to occur as a result of some official action.[253] He, believed, therefore, the 1948 modifications went beyond rank to include all official inquiries.[254] However he concluded that Congress did not intend to extend Article 31 beyond the scope of "official" interroga-

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[244]*Gibson*, 14 C.M.R. at 168.

[245]*Id.* at 171.

[246]*See id.* at 168-69.

[247]*Id.* at 169-70.

[248]United States v. Rodriguez, 69 B.R. 289 (B.R. 1947).

[249]*Gibson*, 14 C.M.R. at 169-70.

[250]*Rodriguez*, 69 B.R. at 292.

[251]Ferguson was a private fust class. Gibson was a private. *Gibson*, 14 C.M.R. at 164, 170.

[252]*Id.* at 170.

[253]*Id.*

[254]*Id.* The exact testimony that the Chief Judge cited was as follows:

> I feel that when anyone authorized to take statements from the accused interrogates him for that purpose that he should tell the accused that any statement he makes may be used against him on the trial of the offense with which he is charged.

Id. Note, however, that Article of War 24 only applies to the accused. *See supra* note 198. As such, people actually conducting official duties with an accused would be more limited. 'Suspect" is a broader term.

tion.[255] He reached this conclusion despite the stated intent of the comment to Article 31(b), to have Article 31(b) extend the privilege of Article of War **24.**

This analysis is suspect. Judge Latimer, concurring with the result, noted some of the problems. In a somewhat confusing assertion, however, he stated that the language of Article 31(b) was so simple as to defy any need for judicial interpretation.[256] ***As*** a general principle of statutory construction, he is indeed correct. He abandoned this position almost immediately, however, by adopting the test he proposed in *Wilson*.[257] Applying his *Wilson* "officiality test," he concluded that the confession was admissible.

Applying his test, Judge Latimer found two of his three conditions lacking. First, the cellmate held no official position relative to the investigation.[258] He refused to adopt the rule of agency from civil law. Second, he found that the investigation had not focused on Gibson as a suspect in this crime.[259] Apparently the only basis for the pretrial confinement was that Gibson had abandoned his guard post.[260] For these reasons, Judge Latimer concurred in the result of admitting the confession.[261] Neither of the other two judges agreed with his analysis.[262]

Judge Latimer had other major disputes, however, with the Chief Judge. His primary disagreement foreshadowed Supreme Court law many years later. Judge Latimer pointed out that Article 31(b) and Article 31(d) contain two separate provisions governing confessions.[263] Article 31(d) holds that a confession must be suppressed if it is obtained ***either*** after failing to issue the Article 31(b)

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[255] *Id.* at 171.

[256] Judge Latimer sought to distinguish the majority's voluntariness inquiry. He first asserted the distinct difference between Article 31(b)—warnings—and Article 31(d)—involuntariness—by noting the plain language differences. ***Id.*** at 178 (Latimer, J., concurring in the result). 'The subject of that subsection [Article 31(b)] is failure to warn and that alone. There is no hint that coercion is hidden in the background." ***Id.***

[257] *Id.* at 181. A problem with this plain text approach exists. Judge Latimer accepts some of the phrases of Article 31(b) as plain and others as requiring interpretation. He admits in the next stage of his analysis that the Article is not clear on *who* must warn. ***Id.***

[258] *Id.* at 181-82.

[259] *Id.* The focus of Ferguson's question was not the offense under investigation. He simply asked Gibson why he was in jail again. ***Id.***

[260] *Id.* at 181.

[261] *Id.*

[262] Judge Brosman notes the positions of both the Chief Judge and Judge Latimer. He agreed with the approach of the Chief Judge, but wrote separately to state his views. Thus, the COMA actually was split three ways. ***Id.*** at 171-72. Judge Brosman severely criticizes Judge Latimer's approach. ***Id.*** at 171-75.

[263] *Id.* at 177-78.

warnings or as a result of coercion or improper influence.[264] Thus his analysis split the two provisions into separate analytical paths. One could, he believed, admit a confession only if it was obtained both after warnings and without coercion.[265]

Judge Latimer also presaged the Miranda decision when he stated that he believed the warnings existed to neutralize the coercive environment that always exists between superiors and subordinates in the military.[266] Officiality, as he perceived it, arises from the specific words of the Code, "suspect" and "nature of the accusation." Therefore, he found that Congress only intended Article 31 to apply in situations of official criminal inquiry, not casual interchanges.[267]

Another defect exists in Chief Judge Quinn's decision. His legal analysis of the history of Article of War 24 and Article 31(b) is seriously flawed. He places considerable reliance on a 1947 Board of Review decision about the failure to warn — United States *v. Rodriguez*.[268] This reliance is logically fatal. The decision not only preceded the UCMJ, it also preceded the Elston Act changes to Article of War 24 in 1948. The 1920 Manual for Courts-Martial, effective in 1948, contained no mandatory warning requirement.[269] Rather, it suggested that investigators inform accused of their right to remain silent. Recognizing that the federal touchstone of admissibility from 1920 to 1949 was voluntariness; a warning was some evidence of that fact, but was not conclusive.[270] However, the Elston Act and the 1949 Manual for Courts-Martial created a duty to warn the accused of the rights.[271] Thus when the Rodriguez board ruled on the warnings, it was not bound by the mandatory language of either Article of War 24 or Article 31(b).

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[264] "That provision [Article 31(d)] is in the alternative and suggests it is severable into two parts, namely (1) a statement obtained in violation of this Article (subsection (b), failure to warn), and (2) a statement obtained by the use of coercion, unlawful influence or unlawful inducement." *Id.* at 178.

[265] *Id.* He proposed a five-step analysis. *Id.*

[266] *Id.* "Of course it can be said that Congress was aware that in the military a superior officer or noncommissioned officer, merely by virtue of his office, exercises influence over a serviceman and, therefore compulsion is always present." *Id.*

[267] Congress could not have intended Article 31(b) to

> cover casual conversation, because the language used compels the conclusion that the interrogator is pursuing some official inquiry as he must know that the person to whom he is talking is suspected of a crime; he must inform him of the nature of the accusation; and he must explain to him that what he says may be used against him in a court-martial.

Id. at 181.

[268] *Id.* at 169 (citing United States v. Rodriguez, 69 B.R. 289 (B.R. 1947)).

[269] *See supra* note 197.

[270] *See* United States v. Rodriguez, 69 B.R. 289, 292 (B.R. 1947).

[271] *See supra* note 198.

Chief Judge Quinn's analysis becomes further strained when one considers that the analysis of the Morgan draft and the House reports on Article 31(b) both state that it was intended to ***extend*** the provisions of Article of War 24.[272] Thus, Chief Judge Quinn's reliance on a 1947 holding—twice removed by statutory modification from the statute he was interpreting—is suspect at best. Given the state of Fifth Amendment law in the rest of the nation, the decision is not that surprising. Voluntariness was the central issue in determining admissibility. The only other United States jurisdiction that had a statutory warning requirement was the State of Texas. It only used the warning as evidence of voluntariness.[273] Thus, the COMA refused to take the lead among American criminal courts in guarding suspect's rights.

Instead, the COMA majority placed greater importance on not interfering with the efficient administration of justice.[274] In *Gibson*, the COMA presented several arguments supporting its analysis that implied Congress did not intend Article 31(b) to hamper police investigations. Specifically, the COMA stated that the use of informers was a practice that was accepted by civilians.[275] The COMA reasoned that because Congress had not disapproved of informers, or written any provision concerning them into the UCMJ, it must have approved of their use.[276] Congress may well have approved of their use, but the COMA abused congressional intent with its reasoning. Determining what Congress meant by what it never considered is the most speculative of legislative analyses.

Among other arguments, the COMA noted that nothing in the history of Article 31(b) "calls for a conclusion at variance with the results obtaining in civilian jurisdictions."[277] This view ignores that no civilian jurisdiction, save Texas, had any warning requirement. Additionally, it ignores the congressional record that, in other contexts, the COMA found so convincing. When pointedly asked if there was any warning requirement in civil law, Felix Larkin responded that he knew of none.[278] The clear import of what Congress did when it created Article 31(b) is that the Article was intended to be a sharp departure from "the normal protection" provided by any other

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[272] *See supra* note 210; *see also* UCMJ Hearings, *supra* note 194, at 984.

[273] *See* United States v. Gibson 14 C.M.R. 164, 173 (C.M.A. 1954) (Brosman, J., concurring).

[274] *Id.* at 170. This reflects the same shifting of values that the Supreme Court applied in *Quarles* when it elevated public safety over the privilege against self-incrimination,

[275] *Id.* at 171.

[276] *Id.*

[277] *Id.*

[278] *See* UCMJ Hearings, *supra* note 194, at 984-85.

civilian criminal court. The COMA failed to give substance to this departure, finding instead, that because Congress did not disapprove of informers, it must have approved.

2. Officiality Spins out of Control—Over the next several years, the COMA continued to give great weight to police practices, often directly reducing the rights of military suspects. Thus, by 1960, in *United States v. Vail and Brazier,* the COMA reached a conclusion that would have shocked the *Mirandu* Supreme Court.

In *Vail and Brazier,* the COMA held that an officer making an arrest of a suspect caught "red handed" in larceny could ask, at gun point, where the stolen property was located.[279] While the Supreme Court would reach a somewhat similar conclusion in *Quarles* many years later, the rationale of the courts would differ greatly.[280]

In *Vail and Brazier,* Air Force Security Police had information that a group of airmen were going to steal weapons from a warehouse on base. The Provost Marshal, a major, and several security policemen surrounded the warehouse in a stakeout. Soon they observed the two accused enter the warehouse and then come out loaded down with weapons. The security police lost sight of the two accused. The Provost Marshall decided to move in for the arrest. He caught Vail and Brazier and told them to "spread eagle" on the ground. He then fired his pistol in the air to summon the other police. After that, he asked Vail and Brazier where the stolen guns were located. He never read them their rights.

The COMA held that this action was permissible. The COMA reasoned that the suspects had been caught "red handed." Furthermore, the questioning was not part of the interrogation, rather a normal part of the arrest procedure.[281] The COMA reasoned that because the suspects knew what they were suspected of, Article 31(b) did not apply.

Even Judge Latimer concurred in this result. His three-part officiality test allowed such a result.[282] Judge Latimer wrote that the security policeman was not conducting an official investigation when he asked for the incriminating response. Additionally, the policeman was not "interrogating" the accused. Judge Latimer reached this conclusion by reasoning that the policeman had not thought out the question.[283] Rather, the policeman was reacting to

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[279] United States v. Vail and Brazier, 28 C.M.R. 358 (C.M.A. 1960).

[280] *Id.* at 136.

[281] *Id.*

[282] *Id.* (Latimer, J., concurring).

[283] *Id.*

the situation and attempting to prevent the weapons from falling into foreign hands.

In light of ***Mirandu,*** decided six years later, the result of this trial does not represent the current state of the law. However, it displays the flexibility and potential for abuse in the original "officiality" test. This test clearly cannot protect the core concern of the *Miranda* Court—the elimination of the inherently coercive atmosphere of custodial interrogation. The test also fails, coincidentally, to protect the core concern of Congress in creating the UCMJ—the elimination of military rank and discipline from the administration of justice.

3. The Opportunity of United States **v.** Tempia—The opportunity for the COMA to return Article 31(b) to its rightful place came in 1967 with ***United States v. Tempia.***[284] By 1966, the COMA had decided numerous Article 31(b) cases and had narrowed the law to the point described above. The Supreme Court's decision in ***Mirandu*** should have placed the COMA on a new course. Indeed, the decision in ***Tempia*** appeared to take that new course. The COMA recognized it would have to re-examine its own decisions about the Fifth Amendment and Article 31(b) in light of *Miranda.*[285] Unfortunately, ***Tempia*** failed to provide any new guidance on Article 31(b) and the rights warning triggers. Its central focus was the right to counsel and the military's procedures for producing counsel. Nevertheless, part of the COMA's holdings are relevant to the Fifth Amendment aspects of Article 31(b).

As an initial matter in ***Tempia,*** the COMA rejected any notion that the Constitution did not apply to service members.[286] It held that service members enjoy full constitutional rights—except in those limited areas that the Constitution itself directly contradicts such treatment.[287] Moreover, the COMA found that it was bound by Supreme Court precedent in the area of constitutional rights.[288] It then sought to determine if Airman Tempia's rights were violated even though the military had followed Article 31.

One of the COMA's first conclusions about Tempia was that he

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[284] 37 C.M.R. *249* (C.M.A. **1967).**

[285] *Id.* at 251-60.

[286] *Id.* at 253. In one of perhaps its most famous pronouncements, the COMA held that, "The time is long since past—as, indeed, the United States recognizes—when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, ***ipso facto*** deprived of all protection of the Bill of Rights." ***Id. But see*** United States v. Davis, 114 S. Ct. 2350, 2354 n. (Court ***need not*** decide whether the Fifth Amendment applies to military because of presidential action in promulgating Military Rule of Evidence 304(a), (c)(3)).

[287] *Tempia,* 37 C.M.R. at 254.

[288] *Id.*

had been subject to a custodial interrogation.[289] He had been arrested and then released to seek consultation with a lawyer. The COMA found that his summons back to the police station constituted custody.[290] It noted "[hlad he not obeyed, he would have undoubtedly subjected himself to being penalized for a failure to repair"[291] which was a violation of a punitive article of the UCMJ. The COMA continued, "It ignores the realities of the situation to say that one ordered to appear for interrogation has not been significantly deprived of his freedom."[292]

The remainder of the decision deals primarily with the right to counsel aspects of Miranda. Within that framework, the COMA engaged in a broader philosophical debate over the difference between Article 31 and the Miranda rule. At issue was the significance of the Supreme Court's approval of Article 31 in Miranda. Chief Judge Quinn, in dissent, stated that because the Supreme Court had approved of Article 31, the COMA need not alter any of its case law to respond to *Miranda*.[293] (Indeed, the Supreme Court had cited Article 31(b) with approval in the Miranda decision.[294]) The remaining two judges disagreed, holding that the Supreme Court required a minimum provision of counsel in every case.[295] The Air Force had provided Tempia access to the staff judge advocate, not a defense counsel. The COMA held that this was not the sort of independent lawyer that the Supreme Court required. Consequently, it held that Article 31 was not as broad as the Miranda ruling, at least as far as the right to counsel was concerned.[296]

The issue of the full scope of Fifth Amendment rights as protected by Article 31(b) was not squarely before the COMA. The dis-

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[289] *Id.*

[290] *Id.*

[291] *Id.* at 256.

[292] *Id.*

[293] *Id.* at 263 (Quinn, C.J., dissenting).

[294] Miranda v. Arizona, 384 U.S. 436, 489 (1966). The UCMJ was the only United States precedent for a warning requirement that the Court cited in *Miranda*. Id.

[295] *Tempia*, 37 C.M.R. at 259-60.

[296] Article 31 does not inform suspects that they have a right to their own defense counsel free of charge during the investigation. UCMJ art. 31(b) (1988). The Air Force provided Tempia with access to the base staff judge advocate, the principal legal advisor to the person who could eventually convene a court martial to try Tempia. *See* id. art. 34. This was not an independent lawyer of the sort contemplated under Miranda. Tempia, 37 C.M.R. at 257-59. This very issue was again raised in a concurring opinion by Judge Cox in United States v. Lincoln, 42 M.J. 315, 322 (1995). Judge Cox's concurring opinion gives a detailed exposition of his analysis of the military "right" to counsel. See *also* Ralph H. Kohlmann, Are *You* Ready *for* Some Changes? Five Fresh Views of the Fifth Amendment, ARMY LAW., Mar. 1996, 62, 68-72 (discussing the *Miranda* Fifth Amendment history of right to counsel as they relate to Article 31).

sent noted, however, that Article 31 existed to preserve the rights of the Fifth Amendment in the unique military context.[297] The specific issue in Tempia was the right to counsel rather than the right to silence.[298] It did not address the Miranda triggers, other than custody, in a unique military setting.

4. Position *of* Authority Test—United States v. Dohle—The COMA's first major shift in Article 31(b) jurisprudence came in 1975 with the case of United States *v. Dohle.*[299] In that case, the COMA adopted a test known as the "position of authority" test. Unfortunately, that test was short lived, for the COMA rejected it in 1981in favor of the "officiality" test of United States *v. Duga.*[300]

Dohle was suspected of stealing some weapons from the unit arms room. When questioned by the police, he invoked his rights to silence and counsel under Article 31(b) and Miranda-Tempia. A good friend of the accused, Sergeant Prosser, was detailed to guard him. While performing this duty, Prosser asked Dohle about the theft. Dohle admitted to the theft. The prosecution admitted this statement at trial.[301]

The COMA overturned the conviction, holding that Sergeant Prosser should have read Dohle his rights under Article 31(b). The COMA rejected the prior test that it had been applying, in favor of an objective test focusing on the perceptions of the accused.[302] The COMA rejected any subjective inquiry into the motives of the questioner due to the possibility of multiple motives.[303] Instead, the COMA adopted a focus on the military relationship between the two parties as the relevant focus.[304] Finally, echoing Miranda, the COMA held that it was the suspect's state of mind that was central to Article 31(b) protection.[305]

However, this application of principles setting Miranda law parallel to Article 31 was the broadest given at any time in Article 31's history. What followed from the COMA was a return to a narrow scope of rights.[306]

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[297] *Tempia*, 37 C.M.R. at 263 (Quinn, C.J., dissenting).

[298] *Id.* at 259-60.

[299] 1 M.J. 223 (C.M.A. 1975).

[300] 10 M.J. 206 (C.M.A. 1981).

[301] *Dohle,* 1 M.J. at 224.

[302] *Id.* at 225-26.

[303] *Id.* at 226.

[304] *Id.*

[305] *Id.*

[306] One can only speculate whether the Supreme Court knew what the COMA had done to Article 31(b) since its inception. Facially, Article 31(b) appears to offer greater protection than that afforded by *Miranda.* It does not appear to require cus-

IV. The Current Test from United States v. Duga

A. The Case of United States v. Duga

The COMA's next major case addressing the Article 31(b) triggers came in 1981 in United States v. *Duga*.[307] The COMA held that questioning of a suspect by a person not acting in an official capacity did not require Article 31(b) warnings.[308] On its facts, viewed against most of Article 31(b) precedent, and against Miranda, Duga was decided correctly. However, once again, the COMA went too far in explaining the concept of "officiality."

Airman Dennis Duga was a military policeman in the security squadron at Lowry Air Force Base. In the summer of 1978, the Office of Special Investigations (OSI) began an investigation into the larceny of a canoe from the base recreation services department. The OSI called in one of Duga's friends and fellow policeman, Airman Byers, for an interview. During the interview, the OSI asked Byers if Duga had anything to do with the larceny. Byers allegedly told the OSI everything that he knew and the OSI released him. At the end of the interview, the OSI asked Byers to let them know if he received any more information about the theft.[309]

In addition to being members of the security police squadron, Byers and Duga had been roommates and had seen each other socially on several occasions. Both were Airmen First Class.[310] A few days after the interview, Byers encountered Duga at the gate to the base while Byers was on duty as a security policeman. During the conversation, Byers asked Duga about the OSI's investigation. Duga told Byers that the OSI was looking for something in his (Duga's) truck. Duga later admitted that the article in question was a stolen

tody, *only questioning coupled with suspicion.* It is not tied to police action at all. Rather, on its face, it applies uniformly to all persons subject to the UCMJ. It requires a recitation of the general nature of the offense. *Miranda* only requires the warning with no orientation as to the offense under investigation. One can only speculate whether the Justices were aware that the COMA had, a full six years before *Miranda,* refused to render the protection of Article 31(b) in a classic *Miranda* situation. *See* United States v. Vail and Brazier, 28 C.M.R. 358 (C.M.A. 1960). Given the activist attitudes of the Supreme Court in *Miranda,* one cannot necessarily conclude that while approving of Article 31, the Court would have approved of the result in *Vail and Brazier.* Arguably, the "approbation" of the military procedure resulted from an understandable misapprehension that the law was being applied the way it was written. Sadly, that was not the case and has not been the case since *Tempia.*

[307] 10 M.J. 206 (C.M.A. 1981).

[308] *Id.* at 210.

[309] *Id.* at *207.*

[310] From the record, the rank structure that existed between Duga and Byers is unclear. At one point in the opinion, the COMA states that they were the same rank. However, the case style states that Duga was an Airman First Class. *Id.* at 206. Later it refers to Byers as "Airman." *Id.* at *207.* At another point, it indicates that Duga outranked Byers. *Id.* at 212.

canoe. Two days later, Byers again talked to Duga about the larceny. This time the conversation occurred in the dormitory with a number of other persons present. Byers later reported the statements to the OSI. During all these conversations, Byers never read Duga his Article 31(b) rights.[311]

Byers testified during a suppression motion that he had acted out of his own curiosity[312] and the military judge refused to suppress the statements.[313] Duga was convicted of larceny largely on the basis of Byers' testimony.[314]

The COMA noted that, applied literally, Article 31(b) would require Byers to read Duga his rights. The COMA recalled its precedent in both Wilson and Harvey and Gibson and echoed the rationale that it had a "duty to see to it that such rights are not extended beyond the reasonable intendment of the code at the expense of substantial justice and on grounds that are fanciful or insubstantial."[315]

The COMA then proposed to apply reasoning almost perfectly mirroring Miranda law to the Article 31(b) scenario.[316] Unfortunately, the COMA did not follow the reasoning to its logical conclusion. First, the COMA observed that the purpose of Article 31 was to safeguard the Fifth Amendment.[317] In this regard, the COMA noted—as had the Supreme Court—that Article 31 is not a right. Rather, it is a guardian, or prophylactic protective measure, of a greater principle.[318] Second, the COMA noted the special psychological conditioning that is a part of military indoctrination. Quoting from a prior case of United States v. *Armstrong*,[319] the COMA noted:

> Conditioned to obey, a serviceperson asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be especially amenable to saying what he thinks his military superior wants him to say—whether it is true or not. Thus, the serviceperson needs the reminder required under Article 31 to the effect that he need not be a witness against himself.[320]

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[311] *Id.*

[312] *Id.* at 207-08.

[313] *Id.* at 208.

[314] *Id.*

[315] *Id.* at 209.

[316] *See generally supra* text accompanying notes 3-121.

[317] *Duga,* 10 M.J. at 209.

[318] *Id.* (citing United States v. Gibson, 14 C.M.R. 164, 170 (1954) (Brosman, J., concurring)).

[319] 9 M.J. 374 (C.M.A. 1980).

[320] *Id.* at 378 *(quoted in Duga,* 10 M.J. at 209-10).

The COMA's final appeal to *Miranda* rationale came in the form of a paraphrase of the Supreme Court majority opinion in *Innis:*

> The concern of the [Congress] in [enacting Article 31(b)] was that the "interrogation environment" created by the interplay of interrogation and [military relationships] would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory incrimination contained in Article 31(a) of the Uniform Code of Military Justice.[321]

Therefore, the COMA concluded that Article **31** only applied when rank or duty position exerted subtle pressure on the suspect to respond.[322] The COMA determined that the means to analyze these conditions was to inquire into the motivation of the questioner and the perceptions of the suspect.[323] Unfortunately, this test does not follow *Miranda* principles. Under *Miranda,* the only relevant inquiry is into the reasonable perceptions of the *suspect.* In a cryptic footnote, the COMA distinguished and, indeed, rejected its "position of authority" test from ***Dohle,*** finding that it did not apply in Duga's situation.[324]

To apply its new rule to the facts of *Duga,* the COMA reviewed the evidence in the case. It noted that Duga did not choose to testify on the suppression motion and that only Byers's testimony was heard. The COMA stated that it would accept, as uncontroverted, that Duga and Byers were friends, that they were in the same unit, and, most significantly, that they only were speaking as friends when Duga confessed.[325] The COMA concluded from this evidence that Byers was genuinely acting out of personal curiosity. Therefore, the COMA upheld the finding of a lack of officiality. Unfortunately, these factual findings focus entirely on the perceptions of Byers, not Duga.

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[321] *Duga*, 10 M.J. at 210. *Cf.* Rhode Island v. Innis, 446 U.S. 291, 298-99 (1980).

[322] *Duga*, 10 M.J. at 210.

[323] *Id.* "Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation." *Id.*

[324] This particular conclusion is somewhat startling as the *Dohle* test would not have excluded Duga's statement. The footnote in *Duga* that discards the *Dohle* test states that the test asks whether Duga perceived a position of authority in Byers and whether the questioning was part of an on-going investigation. *Id.* at 210 n.6. In the footnote, the COMA states that the *Dohle* test has these two prongs. Further, it states that the second prong comes from the case of United States v. Kirby, 8 M.J. 8 (C.M.A 1979). ***Kirby*** does not clearly establish this second alleged prong of *Dohle,* although it reveals a deeply divided court that was beginning to draw the concept of officiality back into the Article 31(b) equation as early as 1979. *See* ***id.*** at *8.*

[325] *Duga*, 10 M.J. at 211.

The COMA continued and concluded that Duga could only have perceived the conversation as casual talk between friends.[326] It noted that Duga "boasted" of his criminal achievements and of his plans to hide his van from the OSI. As a result of this boasting, the COMA also concluded that Duga did not perceive Byers as an agent seeking a criminal confession.[327] Moreover, the COMA found that there was no subtle coercion at work. In this regard, the COMA found it significant that Duga was a security policeman and that Byers stated that Duga outranked him.[328] In a footnote, the COMA found it somewhat significant that the accused stated that he knew his Miranda rights.[329]

In a related motion at trial, Duga apparently had sought to exclude certain statements made to a civilian police officer as violating his Miranda rights.[330] The COMA noted that, in support of this motion, Duga admitted that he knew of his rights and that he carried a rights warning card. The COMA concluded "the appellant knew that, if he did not want to, he did not have to answer any of Byers' questions."[331]

Perhaps, the COMA was comforted in the factual finding that Duga knew of his Miranda rights. Unfortunately, Miranda explicitly held that this type of inquiry was irrelevant. Indeed, this was just the sort of "voluntariness" inquiry that the Supreme Court eliminated with *Miranda*.[332] Thus, the military courts considered evidence that, in view of Miranda, was constitutionally infirm. In deciding Duga, the COMA tried to mirror Miranda rationale, but missed the mark.

This is not to say that the ultimate decision in Duga is wrong.

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[326] *Id.*

[327] *Id.*

[328] *Id.* at 212.

[329] *Id.* at 212 n.8.

[330] *Id.*

[331] *Id.*

[332] In *Miranda*, the Court held:

> [W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessment of the knowledge the defendant possessed, based on information as to his age, education, intelligence or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person being interrogated, a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

Miranda v. Arizona, 384 U.S. 436, 468-69 (1966).

It is wrong only because of the COMA's reasoning. Although the COMA set out on a correct analytical path, it made several illogical detours. These detours resulted from the COMA's (1) failure to cut loose first from due-process voluntariness law;[333] and (2) the inexact application of the ruling in *Miranda*[334] and its progeny.

The COMA initially noted that Article 31(b) serves as a shield to the Fifth Amendment.[335] This observation is correct from both a legislative historical[336] standpoint and from the Miranda decision.[337] It then noted that as a "guardian," Article 31(b) is distinct from the right embodied in the Fifth Amendment.[338] Once again, this is a correct statement of the law. The Supreme Court makes the same distinction in distinguishing cases that show warning violations from those showing due process violations.[339]

The COMA's detour from Miranda occurred when it applied its second point of reasoning to the facts. The COMA invoked the Supreme Court's Innis decision and paraphrased it to apply to Article 31(b). In Innis, the issue was whether the police had actually interrogated Innis.[340] The Supreme Court's language (which the COMA appeared to graft onto Article 31(b)) related to the central feature of Miranda — the dual triggering events of custody and interrogation.[341] Innis adopted what has been called a "synergistic"[342] approach to Miranda. This approach holds that the special psychological situation which Miranda and its progeny seek to defuse is created by the unique interplay of custody and interrogation.[343] In *Duga*, the COMA sought to take the same approach in applying Article 31 and, in paraphrasing Innis, replaced "custody" in Innis with "military relationships." In theory, this is an attractive concept.

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[333] *Compare* the Supreme Court's division of the two bodies of law in Withrow v. Williams, 113 S. Ct. 1745 (1993) *and Miranda*, 384 *U S*. at 436 *with* that of the CAAF. In *Withrow*, the Supreme Court repeated its reluctance to apply a "totality of the circumstances"-voluntariness inquiry to a "traditional" *Miranda* fact pattern. The Court noted, "We thus fail to see how abdicating *Miranda's* bright-line . . . rules in favor of an exhausting totality of the circumstances approach on habeas would do much of anything to lighten the burdens placed on busy federal courts." *Withrow*, 113 S. Ct. at 1754. In contrast, the CAAF still applies the totality test.

[334] *See infra* text accompanying notes 338-56.

[335] *Duga*, 10 M.J. at 209.

[336] *See supra* text accompanying note 205.

[337] The *Miranda* Court pointed to Article 31(b) as an example of a United States warning requirement that *apparently* supported the Fifth Amendment. *See Mirandu*, 384 U.S. at 489.

[338] *See, e.g.*, Withrow *v.* Williams, 113 S. Ct. 1745, 1751-53 (1993).

[339] *Id.* at 1754.

[340] *See generally supm* text accompanying notes 122-46.

[341] Rhode Island v. Innis, 446 U.S. 291 (1980).

[342] *See Eager, supra* note 40, at 1.

[343] *Id.*

Unfortunately, the COMA did not complete its analysis in a manner consistent with *Miranda-Innis.*

The attractive nature of this approach comes from the discussions that both the Supreme Court and the COMA use regarding psychological pressures. In *Mirundu* and its progeny, the Supreme Court consistently speaks of the subtle psychological pressures resulting from the combination of custody and interrogation.[344] Furthermore, in *Miranda,* the Court reviewed police practices and found that the police regularly took advantage of the pressures of custody and used them to produce confessions.[345] Thus, for the Court, custodial interrogation presented a compelling situation arising from unique *government-created* control and domination over the suspect.

The same government domination and control exists inherently in certain military situations.[346] Respect, obedience, and, arguably fear, of superior authority are fundamental components of the military indoctrination process.[347] A functioning military cannot achieve its fundamental goal of winning war without inculcating a degree of unquestioning obedience in its soldiers, sailors, marines, and airmen.[348] Indeed, the UCMJ itself contains the disciplinary tools allowing a commander to compel obedience. Within limits, that power is absolute. A commander could order a subordinate to complete a task that could, in combat, result in the death of the subordinate.[349] In time of war, failure to obey the legitimate order of a supe-

[344] *See, e.g.,* Miranda v. Arizona, 384 U.S. 436, 464-65 (1966); Rhode Island v. Innis, 446 U.S. 291,299 (1980).

[345] *Miranda,* 384 U.S. at 449-50.

[346] *See* United States v. Armstrong, 9 M.J. 374, 378 (C.M.A. 1980).

[347] *See* NICO KELJZER, MILITARY OBEDIENCE 40-41 (1978).

[348] *See, e.g.,* T.R. FEHRENBACH, THIS KIND OF WAR 5-6, 426-43 (1962). Indeed, the author of *Duga,* Chief Judge Everett, found this same coercion present in most military situations. He did so, however, in a book that he wrote years before he was elevated to the COMA:

> [A R]ecruit may readily infer that, unless he does not make a statement, he will go to the guardhouse for an extended period of time. The net effect may be that he will feel as much under compulsion to make some sort of statement as if he had been ordered to do so, or threatened with punishment or a beating if he did not do so . . . . The pressure to confess is something built up entirely in [the] Recruit's mind, operating in light of certain fundamental military doctrines.

EVERETT, *supra* note 17 at 76.

[349] Articles 90 and 91 of the UCMJ give officers and noncommissioned officers (respectively) the legal power to compel obedience. In peace time, the maximum punishment for disobedience is five years for violation of an officer's order and one year for violation of a noncommissioned officer's order. MANUAL FOR COURTS-MARTIAL, United States, ¶¶14(e)(2), 15(e)(5) (1984) hereinafter MCM].

rior officer can result in the death penalty.[350] Furthermore, training on the UCMJ is, by operation of Article 137 of the Code, a fundamental part of every basic training curriculum in the United States Armed Forces.[351] Thus, the military desires, and indeed demands, a degree of psychological pressure simply not found in the civilian world.[352] It does this through legal indoctrination on the very subject that the COMA replaced the *Miranda* word "custody" with—"military relationships."[353] For it is the relation of senior to subordinate,[354] of officer to enlisted,[355] of sergeant to private356 that the UCMJ enforces with the rule of law and the iron hand of discipline. It is the inculcation of a rigid rank and duty structure that fundamentally serves the goals of the country in raising and maintaining an Army.[357] It also is this necessary evil—the influence of rank—that the UCMJ sought to exclude from justice, rendered as discipline, under the Code.[358]

Arguably, the COMA was correct in paraphrasing *Innis*. It sim-

[350] *Id.* ¶15(e)(3).

[351] UCMJ art. 137 (1988). "[Various articles, to include all of the punitive articles] shall be carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter." ***Id.*** According to General George S. Patton, Jr., military discipline is an intrinsic part of military training. Discipline must be "so ingrained that it is stronger than the excitement of battle or the fear of death." George S. Patton, Jr., ***quoted in*** EDGAR F. PURYEAR, NINETEEN ***STARS*** 254 (Presidio Press 1992)(1971).

[352] ***See, e.g.***, KELJZER, ***supra*** note 347, at 46-47. "For example, in the confusion of combat, the need for coordination is felt at every level. To give as much stability as possible in that confusion, hierarchical organizations form a suitable instrument, as it always indicates the superior as the one who should take the lead." *Id.* at 47. ***See also id.*** at 49, 55.

[353] KELJZER, ***supra*** note 347, at 56, 62, 63.

[354] Articles 88-94 of the UCMJ enforce the military structure by force of law. Article 88 makes officers criminally liable for uttering contemptuous words against various enumerated civilian political superiors. ***See*** UCMJ art. 88 (1988). Article 89 makes disrespect by anyone subject to the Code towards any superior officer a crime. ***Id.*** *art.* 89. Articles 90 and 91 give orders the power of law. ***See supra*** note 349. Article 93 acts as a counterbalance, prohibiting cruelty or mistreatment of subordinates. Thus, it helps strike the balance between absolute obedience and inhumane treatment. UCMJ *art.* 93 (1988). Article 94 makes mutiny a crime. It defines mutiny as any attempt to "usurp or override lawful military authority." ***Id.*** art. 94.

[355] *Id.* arts. 90, 92.

[356] *Id.* arts. 91, 92.

[357] KELJZER, ***supra*** note 347, at 31.

> Combat is not a contest between individuals. It is a whole made up of many parts. . . . The whole of military activity must therefore relate directly or indirectly to the engagement. The end for which a soldier is recruited, clothed, armed and trained, the whole object of his sleeping, eating, drinking and marching ***is simply that he should fight*** at the right place and at the right time.

CARL VON CLAUSEWITZ, ON WAR 95 (Michael Howard & Peter Paret, eds. and trans., Presidio Press 1984)(1832).

[358] *See* UCMJ art. 37 (1988). ***See also*** EVERETT, ***supra*** note 17, at 11.

ply did not follow the reasoning employed in the paraphrase to a proper legal conclusion. Military relationships, coupled with interrogation, are valid and total surrogates for the *Miranda* synergy of custody and interrogation. However, the logic that the COMA applied fails at this juncture — either Article 31(b) parallels Miranda, or it does not. One should not accept the central premise of Miranda — designed to stand as a guardian of a fundamental, enunciated, constitutional right — and not coincidentally accept the test that the Supreme Court established to measure adherence to that right. For, as the COMA has done, subverting the test inevitably threatens the protection that the warnings seek to provide and strikes at the Fifth Amendment right itself.

The COMA's analysis also failed to track Mirandu's abandonment of the due process-voluntariness tests. The Supreme Court has consistently divided issues of "voluntariness" from issues of warnings.[359] Additionally, it always has measured the application of the Miranda triggers using purely objective criteria.[360] The COMA erred when it engaged in any subjective analysis of the Article 31(b) triggers. Therefore, it erred in its attempted application of Miranda rationale to *Duga*. If the COMA had applied Miranda principles properly, it would have achieved the correct result for the correct reasons.

If the **COMA** had applied the Miranda rationale properly, it still should have admitted the statements Duga made to Byers. **As** an initial matter, Miranda, in its purest sense, does not apply to Duga's situation. While Byers probably was trying to obtain incriminating information from Duga, Duga was never in custody. Furthermore, the Supreme Court has never held that a private individual engaged in a casual conversation has any reason for concern about the Fifth Amendment.[361] The Supreme Court's concern is the governmental creation of an inherently coercive environment.[362] The Court measures the existence of that environment by objective factors.

In *Duga*, there was no objective evidence of a government-induced coercive environment. Therefore, Duga could not have reasonably perceived this environment. Recall, under Miranda, the reasonable objective perception of the accused,[363] not the police officers,

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[359] *See* Withrow v. Williams, 113 S. Ct. 1745, 1752-53 (1993). But *see* Quarles v. New **York,** 467 **U.S.** 649 (1984).

[360] *See supra* text accompanying notes 92-146.

[361] The Supreme Court always has required governmental action, sometimes referred to somewhat inaccurately as "state action." *See* **WHITEBREAD** & SLOBOGIN, *supra* note 19, § 15.05.

[362] *See* Rhode Island **v.** Innis, 446 U.S. 291, 299 (1980).

[363] *Id.* at 301. *Cf. Quarles,* 467 **U.S.** at 656.

governs the analysis.[364] Duga encountered Byers at the gate where Byers was on duty. There is nothing to suggest that Byers detained Duga for "interrogation."[365] The conversation apparently would be viewed as nothing more than two friends talking.[366] Furthermore, nothing indicated that a significant military relationship existed between the two. They were members of the same unit and may have shared some degree of camaraderie,[367] but there was no evidence that this created a special "weakness" that the authorities were trying to exploit.[368] The two were of, at least, the same rank, although at one point in the decision, it appears that Byers actually was junior to Duga.[369] Therefore, there was no implied or explicit rank authority of Byers over Duga.

The only possible military relationship that could reasonably have exerted any pressure on Duga was the special authority of the MPs.[370] With the possible exception that Byers probably was in uniform and perhaps armed, nothing in the decision intimates that this relationship could have had any coercive effect on Duga.[371] Furthermore, the encounter took place in an area that was not selected, apparently, by the government. It was, in all probability, open to public view.[372] In conclusion, there was nothing about the arrangement that invoked any governmental control, either in a police or military relationship context. Reversing the *Miranda* analysis, there was no inherently coercive environment to be countered,[373] consequently, there was no need for the *Miranda* warnings.

One can conclude, then, that the Article 31(b) warnings in

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[364] *Innis*, 446 U.S. at 301.

[365] Nothing in the record, as reported by the COMA, suggests that Byers ever stopped Duga as part of his gate security duty. To the contrary, the impression one gets from the COMA's explanation of the facts is that Duga stopped at the gate to talk to his friend. ***See*** United States v. Duga, 10 M.J. 206 (C.M.A. 1981).

[366] ***See*** ***id.*** at 208.

[367] Comraderie is a factor in social control. It may even play a more important role for service members than it does for civilians. ***See generally*** KELJZER, ***supra*** note 347, at 53-56.

[368] The Air Force court found that the OSI did not use Byers to question Duga. ***Duga,*** 10 M.J. at 208.

[369] *Id.* at 212.

[370] Under the UCMJ, an MP may apprehend any person subject to the Code. MCM, ***supra*** note 349, R.C.M. 302(d).

[371] All of the facts indicate that Byers was not exercising his authority as an MP. ***See Duga,*** 10 M.J. at 206.

[372] Compare this with the factual scenario in Berkemer v. McCarty, 468 U.S. 420 (1984). In *Berkemer,* the Court held that even a formal traffic stop for questioning by a policeman was not necessarily custody, partially ***because*** of the public setting. *Id.* at 438.

[373] ***See*** Miranda v. Arizona, 384 U.S. 436,467 (1966).

Duga were not absolutely necessary. If, as the COMA has maintained, that the stated trigger of Article **2**jurisdiction is without content in Article 31(b), one must draw the line for rights warnings at some other place. Because of the evidence from the limited legislative history that Article **31** was only intended to address the coercion in truly "official"inquiries, adopting a rule that at least parallels the Miranda rule makes sense. Indeed, Miranda indicated that the states could provide an alternative affording the same protection.[374] Furthermore, the Mirandu Court gave approval to, at least, part of the UCMJ approach.[375]

In *Duga,* the COMA set up a logical analysis which suggested that it would draw the "officiality"line at Miranda law. Thus, once the COMA established that line, it should have gone no further in relaxing the warning triggers. Unfortunately, the logic that the COMA applied established precedent that has allowed the Miranda policy line to be crossed. The cases following *Duga* demonstrate how far beyond line that the COMA has strayed.[376]

B. The Case of United States v. Jones

One of the most disturbing factual situations after *Duga* was United States *v. Jones.*[377] The COMA upheld a confession rendered by a hand-cuffed accused to a superior noncommissioned officer which was without Article 31(b) warnings.[378] The COMA concluded that this did not amount an official interrogation.[379]

Private First Class Christopher Jones was a suspect in the attempted murder of Corporal Guyton. The CID interviewed him and, after reading him his rights, obtained a confession. There was no issue as to whether this confession was taken either in violation of Article 31(b) or involuntarily.[380] Jones entered pretrial confinement. Later he was escorted to his regular unit area where he encountered Staff Sergeant Dudley. Staff Sergeant Dudley had previously served as Jones's platoon sergeant. When they met in the unit orderly room, Jones was wearing handcuffs. Additionally, the COMA noted that Dudley was wearing his rank insignia.[381]

Dudley testified that he wanted to talk to Jones because he had

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[374] *Id.*

[375] Id. at 489.

[376] *Accord* Supervielle, supra note 33, at 213 (Supervielle approves of Judge Latimer's officiality test but disapproves of *Duga's* officiality test as tipping the scales in favor of the government).

[377] 24 M.J. 367 (C.M.A. 1987).

[378] *Id.* at 369.

[379] *Id.*

[380] *Id.* at 367.

[381] *Id.* at 367-68.

heard that Jones was "after" another member of Dudley's unit, a soldier named Felton.[382] Dudley further testified that he did not read Jones his rights because he assumed that because the accused was in handcuffs, "all of that had been taken care of."[383] Dudley asked Jones why he had shot Corporal Guyton. Jones responded that he had not intended to shoot Guyton; he meant to hit Felton.[384] Jones sought to have this admission suppressed at trial.[385]

Relying on *Duga*, the trial court held that Staff Sergeant Dudley was acting purely out of personal curiosity.[386] Dudley had testified that no one had assigned him to investigate the case and that this session was really "informal counseling."[387] The trial court found that Jones could have perceived the interrogation as official.[388] The trial court held, however, that *Duga* required that both prongs of the officiality test must be met.[389] The COMA upheld this ruling, quoting the following language from *Duga* and *Gibson*, "[I]t is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation."[390]

The COMA and the trial court concluded that, because Staff Sergeant Dudley was not actually conducting an official inquiry, the first prong of *Duga* had failed. Therefore, there was no reason to read Jones his Article 31 rights.[391] Chief Judge Everett, the author of the *Duga* opinion, concurred in the decision but wrote separately to address the issue of *Duga's* second prong. Chief Judge Everett suggested that the objective perception prong of *Duga* could man-

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[382] *Id.* at 368.

[383] *Id.*

[384] *Id.*

[385] *Id.* at 367.

[386] *Id.* at 368.

[387] *Id.* Counseling, both formal and informal, is an important part of military leadership. *See, e.g.*, FREDERICK W. TIMMERMAN, JR., THE UNIT LEADER AS COUNSELOR, A STUDY OF ORGANIZATIONAL LEADERSHIP 431 (Associates of the USMA, Dep't of Social Sciences, eds., 1976).

[388] *Jones*, 24 M.J. at 368. The military judge found "that although Sergeant Dudley was motivated by his personal curiosity, . . . [his actions] could and probably would have. . . appeared to the accused, . . . [as though Sergeant Dudley] was acting in an official capacity." *Id.*

[389] *Id.*

[390] *Id.*

[391] *Id.* at 368-69.

date the exclusion of the statement.[392] He felt, however, that the actual language of Article 31(b) suggested a different approach. He suggested that Article 31 targets the behavior of interrogators, and not suspects.[393] Persons engaged in purely casual conversation are not acting as interrogators. Therefore, he concluded that Article 31(d) only called for suppression of statements taken in violation of Article 31(b). Because he defined a casual conversation as outside the scope of Article 31(b), he found no violation.[394] Consequently, he believed that an analysis of the interrogator's conduct was central to Article 31.

The COMA's analysis contained several logical flaws, particularly considering *Duga's* application of Mirandu law. The flaws in the case go even further than *Duga;* the confession obtained by Sergeant Dudley even may have violated *Miranda.*[395] The COMA failed to apply *Duga* correctly. In reaching the conclusion in *Duga* that "officiality" was required, the COMA noted the similarity of Miranda and Article 31 law. "Custody" in a traditional Miranda analysis can be replaced with "military relationships" in the Article 31 context. In ***Jones,*** the COMA echoed this, stating

> Because of the effect of superior rank upon one subject to military law, merely asking a question under certain circumstances may be equivalent to a command. The *Duga* decision was an attempt to safeguard service members from compulsory self-incrimination, coercion, and command influence. The uniqueness of the military justice system demands that such subtle pressures as rank, duty, or other similar relationships be purged from the interrogation process.[396]

The COMA concluded, however, that it would only purge these improper influences when they were *intentionally* created *by* the government in the setting of an "official" investigation.397 The COMA refused to give substantial weight to the possible perception of the soldier.

In denying this perception, the COMA denied the entire purpose of Article 31(b). Although, as Chief Judge Everett noted, the rule is written in terms of the conduct of the interrogator, the service member's right against self-incrimination is what is being

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[392]*Id.* at 369 (Everett, C.J., concurring).

[393]*Id.*

[394]*Id.*

[395]In *Miranda*, the Court said it would not consider the subjective knowledge of the suspect in custodial interrogation. ***See supra*** text accompanying notes 84-87.

[396]***Jones,*** 24 M.J. at 368-69.

[397]*Id.* at 369.

protected.[398] The Supreme Court has noted that it is the cumulative effect of government pressures on the suspect that invites the *Miranda* warnings as a prophylactic.[399] The COMA found the pressures present, but denied the privilege to the service member on the grounds that the questioner was not acting in an official capacity.[400] The COMA erred by drawing the definition of official capacity too narrowly in the military context.

The COMA also failed to give weight to Dudley's purpose. What was the motivation of Staff Sergeant Dudley in asking Jones the questions? It was for an official purpose.[401] The COMA concluded, however, that Dudley was merely acting out of personal interest. Unfortunately, this finding contradicts Dudley's own testimony — Dudley stated that he was conducting "informal counseling." "Counseling" in the military context is conducted by superiors.[402] It is a regular occurrence and expected of noncommissioned officers.[403] Dudley said that he wanted to ask Jones questions because he had heard rumors that Jones was going to do something to Felton. Because Felton was a member of Dudley's unit, Dudley had both a legal responsibility to Felton as well as a leadership responsibility.[404] Dudley felt prompted to talk to Jones because Dudley had heard that Jones was going "after" Felton and "that he was gonna get even with . . . [Felton] or something to that effect."[405] Even if he did not care what Jones had done to Guyton, Dudley wanted to know about these threats to Felton. Furthermore, the official nature of the inquiry is cemented by Dudley's admission that he thought it was permissible to question Jones because someone already had read Jones his rights. Therefore, Dudley knew he was attempting to elicit incriminating information from a suspect of a crime. Although he may not have been a police officer, he perceived his own role in the military as requiring the questioning after a proper rights

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[398] The Fifth Amendment is a personal right. ***See, e.g.,*** Rakas v. Illinois, 439 U.S. 128, 140 n.8 (1978); Couch v. United States, 409 U.S. 322, 327-28 (1973).

[399] *See* Miranda v. Arizona, 384 U.S. 436, 454 (1966); ***see also*** Rhode Island v. Innis, 446 U.S. 291, 298-300 (1980).

[400] *Jones,* 24 M.J. at 369.

[401] "Counseling is a basic responsibility of every *leader* and an important part of taking care of the troops. DEP'T OF *ARMY,* FIELD MANUAL 22-101, LEADERSHIP COUNSELING 2 (3 June 1985) [hereinafter FM 22-101]. ***See also*** DEP'T OF ***ARMY,*** FIELD MANUAL 22-100, **MILITARY** LEADERSHIP 247-50 (31 July 1983) [hereinafter FM 22-100].

[402] *See* ***generally*** FM 22-101, ***supra*** note 401.

[403] *See* ***generally*** FM 22-100, ***supra*** note 401.

[404] DEP'T OF ***ARMY,*** REG. 600-20, **PERSONNEL — GENERAL,** ARMY COMMAND POLICY, para. 2-1 (30 Mar. 1982). "The chain of command assists commanders at all levels to achieve their primary responsibility of accomplishing the unit's assigned mission while caring for personnel and equipment in their charge. *Id.* para. 2-1a. "Commanders are responsible for everything their command does or fails to do." *Id.* para. **2-1b.**

[405] *Jones,* 24 M.J. at 368.

advisement. Even if he was not seeking information about Guyton, he was seeking information about another violation of the UCMJ, namely, communicating a threat to Felton.[406]

If the COMA had analyzed the objective perceptions of Jones, it should have concluded that Dudley should have informed Jones of his Article 31(b) rights. Jones was wearing handcuffs and clearly was in custody, albeit not Dudley's direct custody. Both he and Dudley were wearing their uniforms, displaying their relative position in the military hierarchy. Dudley had served as Jones's direct military superior in the past. They both were members of the same military organization. Furthermore, the questions all related to Dudley's role as Felton's superior. Most significantly, every one of these factors related directly to the military relationship between the two. It was a relationship marked by the dominance of the sergeant over the private.[407] It was a relationship that, by law, required respect and obedience by Jones to Dudley.[408] It is the exact relationship that causes the greatest problems in the UCMJ—the dominance of rank in the administration of justice.[409] It is the very relationship that the UCMJ in general and Article 31(b) in particular, sought to eliminate from the military justice system.[410] Unfortunately, the COMA has successfully defined the relationship out of the equation under the guise of subjective officiality.

Even more unfortunate, is the COMA's sanction of a clear *Miranda* violation. Jones was in custody. Therefore, the first prong of *Miranda* existed. More importantly, however, Dudley asked questions specifically designed to elicit an incriminating response—therefore, an interrogation existed.[411] The only purpose for the questioning was for Dudley to gather information about a threat, made by Jones, against a member of Dudley's unit.

One could argue that this was not a *Miranda* violation because Dudley was not a policeman.[412] This argument ignores, however, the special law enforcement role that all officers and noncommissioned

[406] UCMJ *art.* 134 (1988) (communicating a threat).

[407] Article 91 of the UCMJ establishes the legal authority of the noncommissioned officer. Id. art. 91. See *also supra* note 349.

[408] UCMJ art. 91 (1988).

[409] *See* id. *art.* 37.

[410] *Id.*

[411] *See supra* notes 122-46 (discussing the Supreme Court triggers for interrogation under *Mirandu).*

[412] The Supreme Court generally has not required private persons to give a rights advisement. It distinguishes these persons, however, by the role that they play in the government or criminal justice system. See, *e.g.,* Arizona v. Mauro, 481 U.S. 520 (1987) (taping a conversation between suspect and spouse not custodial interrogation—spouse not an agent of law enforcement); Mathis v. United States, 391 U.S. 1 (1968) (rejecting notion that *Mirandu* only applies to police; tax investigator for IRS was conducting custodial interrogation because the investigation could result in criminal prosecution).

officers play in the UCMJ.[413] Under the UCMJ, all significant decisions regarding disposition of a criminal case are made by command, not legal personnel.

The distinction of private from official action is important because of similar distinctions made by civil courts. Civil courts have never required private store detectives to read rights.[414] The courts have consistently ruled that these detectives are private agents unrelated to any government function. Thus, the courts distinguish the pressures inherent in governmental custodial interrogation from private interrogation. The COMA has had considerable difficulty finding that same distinction. As the officiality doctrine spun on, the line became increasingly blurred.

C. The Case of United States v. Quillen

In 1988, the COMA decided another case which further confused the Article 31(b) issue. In ***United States*** *v. Quillen*,[415] the COMA held that a civilian base exchange security guard was required to advise a soldier-suspect of Article 31(b) rights before questioning him.[416]

Army Specialist Quillen employed a carefully crafted plan to shoplift from the base post exchange at McChord Air Force, Washington. He selected a video tape and carefully attached a security sticker to it before attempting to depart the store. Unfortunately for him, a store detective observed him. The detective, Mrs. Holmes, was a civilian employee of the Army and Air Force Exchange Service (AAFES). She was specifically employed as a store detective.[417] Mrs. Holmes observed Quillen mark the video tape with the security tape. However, she noticed that he had used the wrong color tape for that day. After he left the store without paying, she stopped him, displayed her credentials, and asked for his military identification card. She and an associate then escorted him to the exchange manager's office. She then asked him if he had a receipt for the tape.[418]

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[413] While every person subject to the Code may prefer charges, **see** UCMJ *art.* 30 (1988); MCM, ***supra*** note 349, R.C.M. 307(a), in the Army, it is traditionally the role of the immediate unit commander. Additionally, line officers investigate the charges, **see** UCMJ art. 32 (1988) and line commanders forward the charges and convene courts-martial, ***see*** MCM, ***supra*** note 349, R.C.M. 402-407. Thus, unit leaders play roles in the military justice system that normally are reserved to prosecutors and full-time police functionaries in the civilian world.

[414] *See, e.g., In* ***re*** Deborah C., 635 P.2d 446, 450 & n.4 (1981).

[415] 27 M.J. 312 (C.M.A. 1988).

[416] *Id.* at **315.**

[417] *Id.* at 313.

[418] *Id.*

Quillen stated that he had bought the tape but had lost his receipt.[419] Mrs. Holmes then conducted a check of the video department to see if such a tape had been purchased that day Determining that none had been purchased, she turned Quillen over to the MPs.[420]

At no time did Mrs. Holmes read Quillen his rights.[421] At trial, Quillen sought to have his statements suppressed as a violation of Article 31(b). The military judge, following *Duga*, found that Mrs. Holmes was not conducting an official investigation and that she was not acting as part of the commander's punitive or disciplinary power.[422] Because the situation failed to satisfy the first prong of *Duga*, the trial court admitted the statement.[423]

The COMA reversed this finding and held that Mrs. Holmes was conducting an official investigation.[424] As an initial matter, the COMA reasoned that the exchange service was an instrumentality of the military under the control of the base commander.[425] Additionally, the COMA found that the exchange was under military control because it was required to file reports of crime with base military authorities.[426] Consequently, the COMA ruled that Mrs. Holmes was an integral part of the command's discipline effort and was "not engaged on a frolic of her own."[427] These conclusions added a new turn to the *Duga* test. Now it appeared that the COMA would determine whether the individual soliciting information *should have* believed that he or she was conducting an official investigation.[428] Because the store detective in *Quillen* should have believed that she was conducting an official investigation, the issue remained whether

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[419] *Id.*

[420] *Id.*

[421] *Id.*

[422] *Id.* at 313-14.

[423] *Id.*

[424] *Id.* at 315.

[425] *Id.* at 314. The COMA reached this conclusion by noting a 1942 case that held that post exchanges were instrumentalities of the government. Standard Oil Co. v. Johnson, 316 U.S. 481 (1942) *(cited in Quillen,* 27 M.J. at 314).

[426] *Quillen*, 27 M.J. at 315. Likewise, private store detectives have no authority to initiate prosecution for shoplifting. They must file charges with the local district attorney. *See also* MCM, *supra* note 349, MIL. R. EVID. 305(b)(1), drafters analysis (warnings must be given by persons *knowingly* acting as government agents).

[427] *Quillen,* 27 M.J. at 315.

[428] Mrs. Holmes apparently believed what the regulation told her—that she was not acting in a law enforcement capacity. *See id.* at 315 n.5 (she subjectively did not believe that she was conducting an official investigation). *Id.* at 315. On its review of the facts, the COMA found, as a matter of law, that contrary to her belief, she was engaged in an official investigation. *Id.* Thus, the COMA added a "reasonable person" objective prong without explicitly saying so. The COMA would recognize this prong later in United States v. Good, 32 M.J. 105 (C.M.A. 1991).

Quillen perceived it as such.[429]

The COMA then concluded Quillen could have perceived the interview as "official"[430] and found that Mrs. Holmes's display of her credentials and the routine that she employed in the detention were "anything but casual."[431] Finally, in analyzing Quillen's objective perception of his situation, the COMA attached great significance to the removal of the accused to the manager's office. Accordingly, the COMA held that the second prong of *Duga* was satisfied. The COMA concluded that Mrs. Holmes, a civilian, should have read Quillen his Article 31 rights.

Thus, the COMA appeared to retreat somewhat from *Duga*. By focusing on the "reasonable" detective, the COMA appeared to retreat from the purely subjective approach of *Duga* and *Jones*. Unfortunately for Article 31 law, the decision is somewhat more difficult to apply.

First, as Judge Cox noted in dissent, the decision abandons the special role of Article 31.[432] Article 31, he reasoned, counteracts the effect of superior rank or position.[433] The examination by the store detective did not, apparently, bring rank or position into the equation. Mrs. Holmes was a civilian.[434] She identified herself as a member of exchange security and according to exchange policy was not acting as a law enforcement agent.[435] She had no statutory or regulatory law enforcement function.[436] Furthermore, exchange regulations specifically forbade her from issuing *Miranda* warnings.[437] Furthermore, she had no authority to forcibly detain anyone.[438] Judge Cox concluded that the majority had expanded Article 31's scope beyond that envisioned by Congress.[439]

The decision also reveals another of *Duga's* inherent weaknesses. *Duga* focused initially on the subjective intent of the questioner.[440] If, and only if, the questioner believed that he or she was conducting an official investigation, would the court reach the second

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[429] *Quillen*, 27 M.J. at 315.
[430] *Id.*
[431] *Id.*
[432] *Id.* at 316 (Cox, J., dissenting).
[433] *Id.*
[434] *Id.* at 314.
[435] *Id.* at 315.
[436] *Id.* at 316 n.5.
[437] *Id.*
[438] *Id.* at 316. See also MCM, supra note 349, R.C.M. 302.
[439] *Quillen*, 27 M.J. at 316.
[440] United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981).

stage of the analysis, the objective perception of the suspect. Here, Mrs. Holmes did not believe that she was conducting an official investigation, The trial judge found that she was performing a function unrelated to the commander's disciplinary power.[441] She was not acting on a personal whim, but neither was she, per se, representing the commander's punitive authority.[442]

The trial court's analysis was fair, considering both *Duga* and *Jones*. In *Jones*, Sergeant Dudley was engaged in only "informal counseling."[443] The court found that his role was unrelated to the prosecution of Jones for shooting at Guyton. Similarly, Mrs. Holmes's role in *Quillen* fulfilled an official function. She had a regulatory "mission" of protecting store property.[444] It is apparent, however, from the trial court's ruling that she did not perceive herself as part of the commander's disciplinary machinery.[445]

This shows the danger of the first prong of the *Duga* analysis to both the government and possible defendants. Because the issue of "officiality"rests, in part, on individuals' perceived446 roles in the disciplinary system, *Duga* would inevitably lead to substantial uncertainty over the issue of who must warn. Additionally, as the Supreme Court pointed out in *Berkemer*, a subjective approach is full of opportunity for perjured testimony or, at best, well-coached testimony, about one's perception of roles.[447]

This danger is not substantially mitigated by the majority's apparent addition of an objective analysis. Because the majority did not remove the subjective prong of *Duga*,[448] the trial court still would be required to take evidence from the questioners about their perceptions of their roles. The trial court will then face the prospect of attempting to separate the objective reality from the perception of the questioner.

A 1994 case somewhat clouded the reasoning of *Quillen* with regard to the role of the post exchange detective. In *United States v. Powell*,[449] the *COMA* made a curious ruling with regard to the status of an AAFES detective. Two AAFES detectives detained Powell as he attempted to exit the Fort Meade, Maryland, post exchange

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[441] *Quillen*, 27 M.J. at 313-14.
[442] *Id. See also supra* note 436.
[443] United States v. Jones, 27 M.J. 367,368 (C.M.A. 1987).
[444] *Quillen*, 27 M.J. at 314-15.
[445] *Id.* at 313-14.
[446] United States v. Duga, 10 M.J. 206,210 (C.M.A. 1981).
[447] Berkemer v. McCarty, 468 U.S. 420,442 n.35 (1984).
[448] *See Quillen*, 27 M.J. at 312.
[449] 40 M.J. 1 (C.M.A. 1994).

with some perfume bottles.[450] While he was being detained at the exit, Powell summoned a nearby member of his unit, a fellow MP. This MP asked Powell if he had a receipt for the bottles of perfume. Powell responded that he had none. All of this questioning took place without Article 31 warnings.

Powell's trial defense counsel failed to raise the issue of whether this questioning by the fellow MP and that by the AAFES detectives should be suppressed at trial.[451] Finding the defense counsel's conduct deficient, the COMA also stated "AAFES store detectives are required to comply with Article 31 before interrogating a person subject to the UCMJ."[452] The COMA specifically cited Quillen as the authority for this proposition.[453]

As previously noted, Quillen concluded that an AAFES detective might have to read a soldier his or her Article 31 rights. It did so, however, only after applying an analysis of the totality of the subjective and objective factors of official inquiry surrounding the interrogation.[454] Somewhat problematic is that Quillen found it of "great significance" that the interrogation occurred away from the location of the initial stop—in the exchange detective's office.[455] The significance for the officiality doctrine was the perception of Quillen that he was under interrogation. It is impossible, from a reading of *Powell*, to assess whether the failure of the COMA to address the "official nature" of the AAFES detective interview represents a partial abandonment of the officiality doctrine. If so, it would be a welcome change that would, if nothing else, clarify one form of military interrogation.

D. The *Case of* United States **v.** Loukas

The COMA again addressed the issue of "officiality" in United States *v. Loukas*.[456] The case asked the COMA to apply the public safety exception of Mirunda-Quarles to the military.[457] The COMA did not take this option, choosing instead to further define the nature of an official inquiry.[458] In doing so, the COMA further nar-

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[450]The detectives had been training on the use of the video surveillance equipment when they observed Powell leaving the exchange through the employees exit. Id.

[451]*Id.* at 3.

[452]*Id.*

[453]*Id.*

[454]*See infra* notes and text accompanying notes 415-48.

[455]United States v. Quillen, 27 M.J. 312, 315 (C.M.A. 1988).

[456]29 M.J. 385 (C.M.A. 1990).

[457]*Id.* at 386.

[458]*Id.* The COMA chose this approach even though the court already had adopted the exception in United States v. Jones, 26 M.J. 353 (C.M.A. 1988).

rowed the scope of official questioning to only law enforcement or disciplinary investigations.

Airman Loukas was a member of a C-130 crew. During a long flight, his supervisor, Staff Sergeant Dryer, noticed that Loukas was acting in an irrational manner. Apparently, Loukas was hallucinating. Among other observations, the crew testified that Loukas began speaking to persons who were not there. Loukas also surrendered his loaded pistol to another crew member stating he did not want it. Dryer confronted Loukas and asked him if he had taken any drugs. Loukas replied that he had taken some cocaine the night before. At the end of the flight Loukas was questioned by another crew member, Captain Cottom. He again admitted to drug use. Neither Staff Sergeant Dryer nor Captain Cottom read Loukas his Article 31(b) rights.[459]

The Air Force Court of Military Review (AFCMR) held that, under *Duga,* Staff Sergeant Dryer should have read Loukas his rights.[460] It made a factual finding that Dryer was not acting out of pure curiosity.[461] The AFCMR then applied the "public safety" exception of *Quarles* and allowed the statement to be admitted.[462]

The COMA reversed both of these rulings by finding that *Duga* did not require a rights warning.[463] Because no warning was required, there was no need to apply the "public safety" exception.[464] The ruling that *Duga* did not require a warning resulted in a further narrowing of the "officiality" test.

The COMA held that *Duga* only applied to cases of official law enforcement or disciplinary investigations.[465] In its holding, the COMA reviewed the entire history of Article 31(b) development.[466] It did so with a somewhat revisionist eye towards that history.

The COMA first reviewed *Gibson.* It quoted language from the *Gibson* opinion which focused on the meaning of the words in Article 31(b).[467] It correctly noted that words such as "interrogate," "request a statement," not to mention "suspect" implicate a criminal investigation.[468] The COMA also quoted a somewhat more troubling con-

[459] *Id.* at 386-87.

[460] *Id.*

[461] *Id.* at 387. *See also* Caddell, *supra* note 29, at 17.

[462] *Id.*

[463] *Id.*

[464] *Id.* at 389-90. Additionally, the COMA tried to divorce Article 31 from *Miranda* law entirely. *See id.*

[465] *Id.* at 387.

[466] *Id.*

[467] *Id.* at 387-88.

[468] *Id.*

clusion from *Gibson*. The COMA found that "military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of crime."[469] The origin of this conclusion is interesting. In *Loukas*, the COMA cited to *Gibson* and *Wilson and **Harvey*** as the origin of this conclusion, however, it came directly from *Gibson*. In *Gibson*, the COMA made this statement citing to *Wilson and Harvey*.[470] *Wilson and **Harvey*** contains no such direct assertion. In that case, the COMA held that Article 31(b) was as clear as it could be.[471] A court need not inquire further than Article 2, UCMJ, to determine if the questioner had to issue the warnings of Article 31(b).[472] The only mention of military duty roles in *Wilson and **Harvey*** is that an MP conducted an unwarned interrogation of the suspects. The COMA's conclusion in *Gibson* that *Wilson and **Harvey*** stood for a broad proposition that only MPs conduct criminal investigations was ill considered at best. Moreover, it contradicted the overall spirit of the UCMJ.

The problems with *Loukas* go much deeper than questionable citation. The case attempts to strip Article 31(b) of any meaningful content in the special military environment. The UCMJ is a discipline system regulated by principles of justice. It defines the relative power and roles of the members of the United States Armed Forces. In contains both provisions particular to law enforcement actions by police authorities473 and law enforcement duties and functions for command personnel.[474] Given the scope of the punitive articles of the Code, adopting the COMA's perception of a minimal role of command personnel in law enforcement and disciplinary functions is difficult. Indeed, those articles address both common law crimes and unique military offenses.[475] Furthermore, the reality of military life dictates an inherent law enforcement role for every military supervi-

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[469] *Id.* at 388 (quoting United *States* v. Wilson and Harvey, 8 C.M.R. 48 (C.M.A. 1953)).

[470] United States v. Gibson, 14 C.M.R. 164, 170 (C.M.A. 1954).

[471] United States v. Wilson and Harvey, 8 C.M.R. 48, 55 (C.M.A. 1953).

[472] *Id.*

[473] *See, e.g.*, MCM *supra* note 349, R.C.M. 302; UCMJ art. 96 (1988) (releasing a prisoner without proper authority); *id.* art. 97 (unlawful detention).

[474] *See* UCMJ arts. 15 (commander's nonjudicial punishment), 22- 24 (commander's power to convene courts-martial), 32 (commander must direct investigation of charges by impartial officer before referral of charges to general court-martial) (1988). Indeed, no trial counsel (prosecutor) or MP may cause a case to be tried without the action of the appropriate convening authority. *Id.* arts. 22-24.

[475] The military can prosecute for a number of traditional crimes such as murder (Article 118), rape (Article 120), and larceny (Article 121). Many offenses peculiar to the military also are included, such as absent without leave (Article 86), unlawfully compelling a subordinate to surrender (Article 100), improper use of a countersign (Article 101), and missing movement (Article 87).

sor.[476] The COMA's conclusion that command personnel rarely conduct criminal investigations is highly suspect and particularly dangerous to the policies behind both the UCMJ in general, and Article 31(b) specifically.

The COMA's analysis continued down this tenuous path during the rest of its review of history. It adopted Judge Latimer's *dissenting* opinion in *Wilson and Harvey* and *concurrence* in *Gibson* as a further basis for holding that the questioner had to have a law enforcement role in the "official" questioning.[477] In adopting this standard, the COMA was, in effect, overruling a significant part of its precedent and further narrowing Article 31's scope. The COMA was deeply divided in *Gibson.* Judge Brosman was sharply critical of Judge Latimer's concurring opinion and rejected his notion of "officiality."[478] For the COMA to now adopt it as the law is a questionable application of precedent.

A more disturbing departure from precedent is the importance that the COMA placed on the rationale in *Duga.* In *Duga,* Chief Judge Everett noted that Airman Byers was not acting as an agent of the OSI when asking Duga questions about the crime.[479] If the COMA had found a true agency relationship, it never would have reached the greater issue of Byers' personal role as a person subject to the Code conducting an investigation.[480] Thus, as in *Quillen,* the COMA confused Article 31 agency law with a pure analysis of who must warn.

Judge Cox, concurring in the result, reiterated adherence to the subjective approach of *Dugu* when he stated that "it is obvious that the last thing in their minds is the possibility of a criminal prosecution somewhere down the line."[481] Therefore, Judge Cox found that this situation was noninterrogational which, therefore,

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[476]The person most likely to notice, report, and initially investigate disobedience, is the person disobeyed. In the military, it is axiomatic that when a superior is disobeyed, he or she is the one who attempts first to carry the full force of the order into effect by reminding the subordinate of the power of the superior to compel obedience. Rarely, if ever, are the MPs called in to investigate the disobedience of orders. The same is true of the initial stages of investigation for absence without leave under Article 86. In this author's 18-year military experience, it is the unit noncommissioned officers who first attempt to locate the missing soldiers.

[477]United States v. Loukas, 29 M.J. 385,388(1990).

[478]*See* United States v. Gibson, 14 C.M.R. 171-75 (C.M.A 1954) (Brosman, J., concurring).

[479]United States v. Duga, 10 M.J. 206,208 (C.M.A 1981).

[480]*See, e.g.,* United States v. Penn, 39 C.M.R. 194, 198-99 (C.M.A. 1969) (civilian investigators not acting as agents of the military need not read rights warnings under Article 31(b)).

[481]*Loukas,* 29 M.J. at 390 (Cox, J., concurring).

failed to implicate Article 31.[482]

The author of *Duga,* Chief Judge Everett, dissented sharply from the COMA's holding in *Loukas.* He also reviewed the history of Article 31's development and concluded that there were two poles in Article 31. He said:

> At one extreme—where warnings clearly are required—is a situation in which a law-enforcement agent questions the accused as a suspect; at the other extreme—where warnings clearly are not required—is a situation in which a close friend is engaged in a personal conversation with the accused as a friend, without regard to any military relationship between the two of them. In the middle are all the other myriad situations in which, until now, the question to be answered has been, simply: Was a questioner acting in line of duty in an official capacity on behalf of the Service?[483]

Thus, Chief Judge Everett held to a broader interpretation not tied to law enforcement functions. He further noted the very difficulty set out above—the special function of Article 31(b) in the military setting.[484] He quoted language from the concurring opinion in another precedent Article 31 case, *United States v. Seay,*[485] in which Judge Ferguson stated:

> In the military, unlike civilian society, the exact relationship at any given moment between the ordinary soldier and other service personnel in authority (i.e., commissioned and noncommissioned officers) often is unclear. In the civilian experience, it is unlikely that anyone to whom Miranda might apply would question someone else other than in the former's official capacity—that is, as a law enforcement officer.
>
> However, in the military a company commander may advise or question a member of his command for any of a number of different legitimate reasons, only one of which might relate to a criminal offense. Thus, to simplify matters, and in recognition of the superior/subordinate atmosphere inherent in the military [but] not present in the civilian structure, the requirement is broader in the for-

[482] *Id.* at 390-91 (Cox, J., concurring). This points out another weakness in the COMA's approach. Under *Miranda,* the subjective belief of the examiner is irrelevant to the question of whether there was "interrogation." The focus in ***Mirunda*** is solely on the suspect. ***See supra*** text accompanying notes 122-46.

[483] *Loukas,* 29 M.J. at 393 (Everett, C.J., dissenting).

[484] *Id.* at 393-94.

[485] 1 M.J. 201 **(C.M.A.** 1975).

mer than in the latter.[486]

This statement cuts to the heart of the issue and also identifies the problem that exists even with Chief Judge Everett's *Duga*-subjective approach. The problem is a combination of training and role perception. It may not always be clear to service members when their commanders are wearing their caring, nurturing, paternal command "hat" and when they are wearing their police "hat." Some of the facts in Loukas that were compelling to the majority display this split.[487] The COMA concluded that Sergeant Dryer was concerned about Loukas's health and the welfare of the other members of the crew when he asked Loukas if he had been using drugs.[488] Concurring, Judge Cox found that, quite possibly, Sergeant Dryer was concerned about whether the accused needed immediate medical treatment.[489]

Neither addresses that this same Sergeant also, quite probably, was responsible for ensuring that Loukas kept his dormitory room in order, made all of his assigned duty formations,[490] and participated in mandatory urinalysis.[491] This same individual, at once honestly acting in Loukas's benefit, also has substantial duties, with regard to Loukas, that arguably are *not* in Loukas's best interests. Loukas was a junior enlisted soldier. Dryer was his supervisor and superior noncommissioned officer.[492] Loukas had a duty to obey Dryer's orders.[493]

These orders are the core concern that the COMA has with Article 31(b). The COMA repeatedly has stated that questions from a superior can, in the military context, carry the weight of commands.[494] In Duga's second prong, the COMA has considered the possibility that the service member reasonably may perceive an otherwise innocent question as an order to respond. It has failed, however, through its persistent adherence to an analysis of the role of the questioner, to give substance to the right that belongs to the service member.

A recent case by the COMA might herald a change in its

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[486] *Id.* at 206 (*quoted in Loukas*, 29 M.J. at 393-94) (citation omitted).

[487] *See Loukas*, 29 M.J. at 389.

[488] *Id.*

[489] *Id.* at 391 (Cox, J., concurring).

[490] *See* UCMJ art. 8 (1988).

[491] *See* MCM, *supra* note 349, MIL. R. EVID. 313 (Inspections and Inventories in the Armed Forces). *See also* United States v. Murphy, 28 M.J. 758 (A.F.C.M.R. 1989) (upholding Air Force urinalysis as a routine command function).

[492] As such, Article 91 of the UCMJ governs their relationship.

[493] *See* UCMJ art. 91 (1988).

[494] United States v. Gibson, 14 C.M.R. 164, 170 (C.M.A. 1954).

approach to Article 31 warnings. That case, dealing with the suspect trigger of the warnings rather than the officiality doctrine, appears to indicate a shift to a simple objective analysis. In *United States v. Meeks,* the COMA held that it would apply an objective test only to the issue of whether the questioner should consider the person being questioned a "suspect."[495] Under a *plain text* reading of Article **31,** the warnings are triggered both by the military status of the questioner and subject and by (some degree of) belief that the subject had something to do with an alleged criminal offense.[496]

Air Force Sergeant Meeks did not want to deploy with his unit to the Persian Gulf.[497] Meeks had several interviews with his commander, Captain Anderson, about concerns with the impending deployment.[498] According to Captain Anderson, he spoke to Meeks to find out "what the problem was with [him]."[499] At the conclusion of the last interview, Captain Anderson asked Sergeant Meeks if he would deploy. Meeks responded that he would not.[500] Meeks subsequently faced trial, and was convicted of willfully disobeying the order of a superior commissioned officer.[501]

The issue raised both at trial and on appeal was whether Captain Anderson should have advised Sergeant Meeks of his Article **31** rights before discussing his intent to deploy.[502] Without any in-depth discussion of the issue, the COMA stated that the standard of review of the issue was "whether a reasonable person would consider the appellant a suspect under the totality of the circumstances."[503] In a significant footnote, the COMA observed that the Supreme Court had been applying objective standards in "many areas" in its *Miranda* cases.[504] Specifically, the COMA noted the objective test for custody used in *Stansbury v. California*[505] and the objective test for interrogation from *Rhode Island v. Innis.*[506] In dis-

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[495] 41 M.J. 150, 152 (C.M.A. 1994). ***See*** *also* Ralph H. Kohlmann, *supra* note 296, at 63-68 (discussing impact of ***Meeks*** and ***United States*** *v. Pownall).*

[496] *See supra* text accompanying note 1.

[497] *Meeks,* 41 M.J. 150, 152 (C.M.A. 1994).

[498] *Id.* at 160.

[499] *Id.*

[500] *Id.*

[501] *Id.* at 152. ***See*** *also* 10 U.S.C. § 890 (UCMJ provision). The specific order was that of the commanding officer to deploy to the Persian Gulf. ***Meeks,*** 41 M.J. at 152.

[502] *Meeks,* 41 M.J. at 152.

[503] *Id.* at 161 (quoting from United States v. Leifer, 13 M.J. **337,** 343 (C.M.A. 1982)).

[504] *Id.* at 161 n.3.

[505] *Id.* For further discussion on Stansbury, ***see*** *supm* note 110.

[506] *Meeks,* 41 M.J. at 161 n.3.

cussing the Supreme Court treatment of *Innis*, the COMA stated that the *Innis* Court found that the actual intent of the police was relevant only to the issue of whether the police should have known that their questions reasonably could evoke an incriminating response from the person under interrogation.507

Unfortunately, the COMA did not ultimately have to rely on this analysis in ***Meeks.*** Instead, the COMA relied on another critical fact to conclude that **Meeks** was not a suspect. That fact was, simply, that Meeks had committed no crime at the time of the interrogation![508] There can be no suspect when there is no crime. The COMA concluded that Captain Anderson was merely counseling his subordinate, not interrogating a suspect.[509]

Two judges disagreed with the majority analysis. Chief Judge Sullivan noted that the COMA had long applied a two-pronged subjective-objective analysis.[510] He noted that a testimonial "denial" of suspect status was not the end of the court analysis. Instead, he argued that the actual state of mind of the questioner is critical.[511] In his separate opinion, Judge Wiss argued that the COMA should resolve the issue of the two versus one-pronged test in a more considered manner. He hoped that the majority opinion was just an "inadvertent stumble . . . rather that reflective of an intent substantively to modify the test."[512]

Despite Chief Judge Sullivan's label as dicta and Judge Wiss's hope that the COMA's analysis was a stumble, at least one lower court has accepted the new test as law. In ***United States v.*** *Pownall,* the Army Court of Criminal Appeals (ACCA) noted that Meeks required an analysis of the objective factors of suspicion.[513] The ACCA reiterated what is perceived as the current standard. The ACCA said, "Not all questioning of suspects must be preceded by

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[507] Specifically, the COMA noted the following language from Znnis:

> This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke a criminal response. In particular, whether a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be on which the police should have known was reasonably likely to have that effect.

Id. (quoting United States v. Innis, 446 U.S. 291,302 n.7 (1980)).

[508] *Id.* at 162.

[509] *Id.* The COMA found the purpose of the interview was to inform Meeks of the consequences of not deploying, not to interrogate him about a crime. *Id.*

[510] *Id.* at 162-63.

[511] *Id.* at 163.

[512] *Id.* at 164.

[513] 42 M.J. 682 (Army Ct. Crim. App. 1995).

warnings. . . . The purpose and nature of the questioning — and hence, the motivation of the person asking the questions — are pertinent in analyzing whether warnings are required."[514] Consequently, the current standard for triggering the Article 31 warnings appears to be a mix of subjective and objective standards focusing both on the actual state of mind of the questioner and that of the person being questioned.

Pownall also demonstrates the considerable difficulty that the lower courts have had in applying the "officiality doctrine" when the motives of the questioner are mixed. Pownall was convicted of making false official statements, making and using a false writing, and wrongful cohabitation.[515] One of the false statements was allegedly in response to an inquiry by the first sergeant regarding whether Pownall was married.[516] Pownall had missed a formation and on inquiry by his noncommissioned officer in charge (NCOIC), Pownall responded that he was at the hospital with his wife. The first sergeant, on hearing of this from the NCOIC, inquired at the hospital and was informed that there was no record of her admission. The first sergeant then asked Pownall about this matter. Pownall informed the first sergeant that his wife was using her name from a previous marriage along with her old identification card. The first sergeant told Pownall to get this matter resolved by having the records updated. On later inquiry about updating the records, the first sergeant pointedly asked Pownall if he was married. Pownall responded "yes."[517] This statement formed the basis of the charge of making a false official statement.[518]

In evaluating the actions of the first sergeant, the ACCA found that the first sergeant was not conducting a criminal investigation or seeking incriminating information, Rather, the ACCA found that the questioning was motivated by a desire to help the soldier.[519] This is a rather startling finding, particularly in light of the ACCA's finding that the entire episode of "assistance" sprung first from an inquiry into why the soldier had missed a formation.[520] Missing a formation can be the basis of a charge of absent without authorized leave under Article 86 of the UCMJ.[521] The ACCA failed to analyze exactly how Pownall should have perceived the role of the first sergeant. The same individual who had inquired into a questionable

[514] *Id.* at 686.
[515] Id. at 684.
[516] *Id.* at 686-87.
[517] The facts of the case are found at id. 684-85.
[518] *Id.* at 685 n.1.
[519] *Id.* at 686-87.
[520] *Id.* at 687.
[521] 10 U.S.C. § 886 (1988).

absence had given Pownall an order to correct his records with regard to the wife's name. Because Pownall apparently had failed to follow this order, the first sergeant further inquired into Pownall's marital status.[522] The first sergeant may have had totally "helpful" motives in this line of questioning. The problem is that it is impossible to draw the line in such an inquiry between official inquiry and official concern.[523] The questioning apparently began as a direct result of inquiry into, apparently, disobedience of orders-clearly a violation of the UCMJ.[524] Neither the ACCA in *Pownall* nor the CAAF inform how the subject of the questioning is to separate and distinguish these mixed and conflicting motives.

Even if the CAAF need not follow *Mirandu* law directly in applying Article 31(b) in future rulings, logic and prudential concerns call for such an approach. Rejecting a subjective prong under ***Duga*** would free the CAAF from the possibility of perjured or coached testimony by government witnesses.[525] Additionally, it would make application of the Article that much simpler. It would accomplish this by freeing the CAAF and the courts of criminal appeals from an endless plunge into the voluntariness of the confession where this is not an issue. In *Miranda,* the Supreme Court basically became frustrated at the body of due process and voluntariness law and created a constitutional presumption of involuntariness.[526] The ***Mirundu*** warnings were created as a simple prophylactic measure countering the presumptive coercive nature of custodial interrogation.

With similar bold stroke, the CAAF could free itself and all of its subordinate courts from an endless inquiry into both the voluntariness of the confession and the perceived role of the questioner. Unfortunately, the CAAF has narrowed its approach and denied more service members the protection of Article 31(b). Consequently, the ACCA will find itself increasingly analyzing the role and the specific mission of the questioner.

V. A New Test

The CAAF should adopt a different approach to Article 31(b) cases. This approach can, and should, be more consistent with the

[522] *Id.* at 684-85. The ACCA found it crucial that the first sergeant had not developed a motive to prosecute for this apparent disciplinary offense. This, in the words of at least one commentator adds a new level to the officiality inquiry — the intent to prosecute. Kohlmann, *supra* note 296, at 68.

[523] Kohlmann, *supra* note 296, at 62, 68.

[524] UCMJ art. 92 (1988)(failure to obey order or regulation).

[525] *See supra* text accompanying notes 92-121.

[526] Miranda v. Arizona, 384 U.S. 436,444,468 (1966).

true policy behind the Article 31(b) protection and the UCMJ—discipline in a just environment.[527] A proper test will focus on the objective perceptions of the service member being questioned in the same fashion as *Dohle.* Thus, it would return Article 31(b) to a point where, as *Miranda* law does for civilians, Article 31 will stand a true guardian of the constitutional right against compelled self-incrimination.

A proper analysis of a given situation will address the objective perceptions of the service member being questioned.[528] Thus, the test will eliminate the possibility of deception or coaching by the government or the defense of their own witnesses. Because the analysis will focus only on the objective factors found in a given scenario, testimony as to the subjective impressions of both the questioner and the suspect will be irrelevant.[529] Accordingly, the test will avoid any appeal to emotion or false perception.

What factors should courts examine? The COMA's prior decisions largely answer this question. The issue is what indicia of military superiority are present in the scenario presented. The COMA has long held that rank and official position may give rise to an assumption by service members that a question is a command.[530] Furthermore, the military relationships between service members form the core elements of the UCMJ as a unique military justice system—as opposed to simply a federalized state criminal code.[531] Therefore, viewed in its entirety, the UCMJ, both the punitive and procedural articles, provide guidance about the proper test of Article 31 applicability.

Courts should examine factors such as the rank of the questioner and the suspect. In this regard it will be relevant to inquire whether questioners were wearing their uniforms or had otherwise indicated to the suspects what rank they held.[532] If the questioner is a civilian law enforcement agent working in the Department of Defense, it will be relevant to inquire whether this agent informed

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[527] *See* LURIE, *supra* note 190, at 142-43, 190-92.

[528] The test will focus only on the last prong of the test in United States v. Duga, 10 M.J. 206, 210 (C.M.A. 1981).

[529] This will mirror the *Miranda* approach; see Miranda, 384 U.S. at 468.

[530] United States v. Gibson, 14 C.M.R. 164, 170 (C.M.A. 1954).

[531] *See* generally ***supra*** text accompanying notes 347-58; see also *Duga,* 10 M.J. at 210.

[532] The COMA always has been careful to point out the relative ranks of the parties in its Article 31(b) cases. With the exception of United States *v.* Gibson and United States *v. Duga,* the questioner always has outranked the suspect. For example, in United States *v.* Wilson and ***Harvey,*** in addition to possessing special police authority as an MP, the questioner was the military superior of the suspects. Both the MP and the soldiers were, presumably, wearing their rank, thus displaying the source and weight of their military authority. In United States *v.* Vail and Brazier, there was

the suspect of his or her affiliation with the military. The UCMJ grants certain persons authority over other service members solely by virtue of their rank or position.[533] Thus, a senior of any rank may properly order a subordinate to stand fast and respond to inquiries.[534] Similarly, an MP, in the performance of duty, may properly require a senior to similarly stand fast and respond to inquiries related to that duty.[535] Therefore, the only relevant inquiry would be whether a reasonable service member would perceive the presence of military power in the encounter.[536]

A clear benefit of this new test will be simplicity in administration.[537] Questioners will know, with precision, whether they hold positions of military superiority. Moreover, they will be on notice of the obligation to warn. Personnel being questioned also will be on notice that they have a privilege not to answer.

In the military, this truly is a unique privilege. In normal discourse between a senior and subordinate, the military superior may compel responses. A subordinate who refuses to respond runs the risk of violating a punitive article of the UCMJ.[538] While it is axiomatic that a service member is privileged to disobey truly illegal orders, the burden is on that individual to distinguish the legal from the illegal.

Assuming, ***arguendo,*** that an order to incriminate oneself is illegal, the suspect service member is privileged to disobey it. The CAAF's current analysis, in contrast with the new test, requires the suspect to analyze whether the questioner is acting as an official

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gross disparity in power between the provost marshal, a major, and the airmen. Additionally, there was a disparity based on the special police powers of the provost marshal.

[533] ***See supra*** note 394.

[534] UCMJ arts. 90, 91 (1988).

[535] MCM, ***supra*** note 349, R.C.M. 302; UCMJ art. 91 (1988). Time in service is probably not a critical factor. Article 137 of the UCMJ requires special training early in the service member's career, Thus, only members of the armed forces with less than six days of service are likely to be totally ignorant of both the legal authority of their superiors and the UCMJ. UCMJ art. 137 (1988).

[536] At first blush, this would appear to be an attempt to revive the *Dohle* test. ***See*** United States v. Dohle, 1 M.J. 223 (C.M.A. 1975). That test, however, was short lived because the COMA added a second element requiring an official purpose behind the questioning. ***See*** United States v. Kirby, 8 M.J. 8 (C.M.A. 1979). ***See also*** United States v. Duga, 10 M.J. 206, 210 n.6. (C.M.A. 1981) (footnote distinguishing ***Duga*** from ***Dohle*** by stating that the prerequisites of ***Dohle*** were not met). ***But see supra*** note 324.

[537] ***But see*** Supervielle, ***supra*** note 33, at 211-13 (finding the ***Dohle*** test simple, but believing it punishes the government for private action).

[538] Orders are presumed legal. ***See, e.g.***, Unger v. Zemniak, 27 M.J. 349 (C.M.A. 1989) (order to produce urine specimen not unreasonable). ***See also*** United States v. Ravenal, 26 M.J. 344, 349 n.3. (C.M.A. 1988) (soldier may easily confuse question with order). ***See generally*** SCHLUETER, ***supra*** note 11, § 2-4(A).

interrogator or is just a curious superior. Therefore, the court asks the service member to instantaneously analyze the legal ramifications of both his or her role and that of the senior before answering the question.[539]

Focusing on the perceptions of the suspect will cure this dilemma. The suspect will be informed of the privilege not to answer certain questions. Furthermore, the new test will place the legal burden on the military superior and the government, not on the suspect. It seems logical that, if the government vests the superior with rank and authority sufficient to order the subordinate into battle, it also should trust the superior to use that rank only in furtherance of government objectives.[540] Leaders are "on duty" twenty-four hours a day. Unless leaders clearly divest themselves of their rank and authority, the subordinate must comply with all of their orders.[541] The burden should be on leaders not to abuse their positions of authority by engaging in frolics of their own[542] in pursuit of criminal information from subordinates.

Simplicity in the rights warning triggers will eliminate the current hair-splitting analysis of roles and perceptions. It will replace it with an objective test focusing on the central policy behind both Article 31(b) and the UCMJ.

If the ***CAAF*** has indeed abandoned its subjective analysis of the state of mind of the questioner with regard to the issue of suspicion, as ***Meeks*** suggests, this might reflect a positive step. Article 31, figuratively speaking, asks the question of the examiner—"Do you suspect this person of a crime?" Some subjectivity is inherent in the very wording of Article 31 because it says "[n]o person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense. . . ." The very wording of the text suggests that the person asking the questions has concluded that the person under questioning is a suspect. It requires analysis *by the questioner* of the facts at hand.

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[539]This deliberation cuts against all norms of the nature of military service. "An Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right of command in the officer, or the duty of obedience in the soldier." ***In re*** Grimley, 137 U.S. 147, 153 (1890). ***See*** *also* Parker v. Levy, 417 U.S. 733, 743-44 (1974) (duty of officer to obey order to combat zone without questioning validity of war).

[540]*See, e.g.,* Richard T. DeGeorge, ***A Code*** *of Ethics for Officers*, *in* **MILITARY ETHICS** 13, 23-25 (National Defense University Press 1987) (officers should never order another to commit an immoral act—officers are always responsible for the actions of subordinates).

[541]*See, e.g.,* United States v. Collier, 27 M.J. 806 (A.C.M.R. 1988) *rev'd on other grounds*, 29 M.J. 365 (C.M.A. 1990).

[542]This is a paraphrase of the COMA's language regarding the actions of the post exchange detective in ***Quillen. See*** United States v. Quillen, 27 M.J. 312, 315 (C.M.A. 1988).

Alternatively, the language protected by the officiality doctrine has no such corresponding subjective element. It seeks to shield the words "[n]o person subject to this chapter. . ." from absurd results. If the CAAF would focus, as the Supreme Court has done, on the core elements to be protected—the Fifth Amendment concerns of coerced and unreliable confessions—it should abandon the focus on the state of mind of the examiner. Article 31 protects the service member. The language identifies, as a matter of law "subject to the code," who must warn. The code rejects subjective language at this point in favor of a broad sweeping inclusion. The CAAF should limit its focus on the true evils in coerced military confessions—the objective indicia of rank or military authority—and stop this fruitless inquiry into the state of mind of soldiers, leaders, and the police.

In ***Miranda*** and its progeny, the Supreme Court held that government creation of a coercive environment for confessions violates the Fifth Amendment privilege.[543] It has declined to extend that presumption beyond the boundaries of custodial interrogation, because of the unique psychological pressures inherent in that environment. More importantly, the Supreme Court has steadfastly refused to consider the subjective beliefs of either the questioner or the accused.[544] The CAAF should follow this lead.

Criticism of the ***Dohle*** "position of authority" test, however, also could be leveled at this new test.[545] One possible weakness in the new test is that it penalizes the government in situations in which the government was not truly involved.[546] This criticism, however, begs the question. The focus under ***Miranda*** was the government creation of an inherently coercive environment. If military relationships combine with interrogation to create a similar coercive environment, the government still is the cause of the coercive environment. It is the government that created the power in the military relationship. Therefore, it should bear the burden of the corresponding legal handicaps attendant to that grant of power, just as it bears the other constitutional burdens necessarily attendant to our ***limited*** constitutional government.[547]

Another criticism is that the individual who asks the question

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[543]Miranda v. Arizona, 384 U.S. 436,467 (1966).

[544]*See generally supra* text accompanying notes 113-17,139-46.

[545]*See* Supervielle, ***supra*** note 33, at 211.

[546]*Id.*

[547]In ***United States v. Tempia,*** the COMA held that constitutional principles of *Miranda* applied to the military courts. United States v. Tempia, 37 C.M.R. 249, 254-55 (C.M.A. 1967). Indeed, the COMA held that all constitutional provisions applied ***unless*** the Constitution explicitly excluded them. *Id.* However, recently, in Davis v. United States, 114 S. Ct. 2350,2354 (1994), the Supreme Court withheld judgment on the applicability of the Fifth Amendment.

may be acting out of personal curiosity.[548] Consequently, one might ask, why should the government bear the burden of casual inquiries? This criticism fails to account for the inherent presence of the government in any relationship between military persons of unequal rank or authority. As stated initially in this article, the problem is one of line drawing. How does one distinguish the casual from the official and the voluntary from the coerced? In the *Mirunda* case law, the Supreme Court holds the government responsible for the actions of its officers—the police. Arguably, police who interrogate suspects without the *Miranda* warnings violate their training as officers. They also may be violating departmental policy regarding interrogations. Therefore, in one sense, police officers are acting outside the scope of accepted police practice. The Court refused to exonerate the government for the actions of these officers because the state or federal government granted these officers the authority that they later *abused*. Therefore, the criticism of the test can turn on itself. There is no rational reason why courts should excuse the frolics and abuses of military superiors who, out of *personal curiosity*, seek to extract confessions. While they may not believe they are acting for an official purpose, this is indistinguishable to the suspect. If Article 31(b) is to have any value as part of the UCMJ, it must protect service members from the unlawful use of rank to extract confessions, even, and perhaps most importantly, when that rank is being abused.

Congress created Article 31(b) as part of a uniform military justice code that created a new environment for discipline in the military untainted by rank and improper influence. Rank and position are both products of governmental appointment.[549] On swearing to uphold the Constitution and the Uniform Code, every service member becomes a part of a military system that creates, as an integral part of its structure, psychological domination by those empowered by the government with superior rank or position. It is impossible to sever this domination from relationships on an ad hoc basis. It is this unique psychological coercion, so desirable and necessary in a command environment, that Article 31(b) seeks to eliminate from the justice function. The right belongs to the service members who are the potential targets of the influence of rank and position that is

[548]Supervielle, *supra* note 33, at 211-12. Supervielle argues that there is no benefit from punishing the government through exclusion of evidence if there is no government questioning. *Id.* He also argues that such a rule would prevent a senior from counseling a subordinate for nonlaw enforcement or disciplinary reasons. *Id.* Counseling, however, is different from interrogation or questioning. A senior may counsel a subordinate without asking any questions or in any way attempting to extract information. There is a substantial difference between saying to a subordinate, "Don't do it again," and saying "Why did you do it?" Legitimate counseling can avoid interrogation.

[549]UCMJ arts. 90, 91 (1988).

absolutely necessary in every other facet of military life. Correspondingly, the consequences of rank and authority should rest on the government. The CAAF should return Article 31(b) analysis to the service member's perspective—the very perspective that it was designed to protect.

Although not particularly relevant to this analysis, a return to this perspective would not necessarily result in a different outcome in quite a few of the Article 31 cases.[550] More significantly, however, it would result in a briefer analysis and a policy approach consistent with both the remainder of the Code and the greater body of constitutional jurisprudence under *Miranda*.[551]

VI. Conclusion

Discipline and obedience are the glue that hold a military force together. Over a century ago, General Schofield addressed the Corps of Cadets at West Point and said, "The discipline which makes the soldiers of a free country reliable in battle is not to be gained by harsh and tyrannical treatment. On the contrary, such treatment is far more likely to destroy than to make an Army."[552] Article 31(b) reflects this same philosophy.

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[550] One reason that the results would be no different comes from a new approach by both the Supreme Court and the COMA to rights cases. For several years now it has been possible to retain a conviction even over a rights abridgement if that error was harmless beyond a reasonable doubt. ***See*** Arizona v. Fulminante, **499** U.S. **279 (1991)** (holding that coerced confession subject to harmless error rule; however, this is not a *Miranda* case). ***See also*** United States v. Moreno, **36** M.J. **107, 121** (C.M.A. **1992)** (in dicta, harmless error analysis applied to assumed Article **31** error). Therefore, in cases such as *United States v. Vail and* ***Brazier,*** the court could admit (wrongly) the confession but still convict the accused. In this case, the admission of the confession was harmless beyond a reasonable doubt. The COMA stated unequivocally that the suspects were observed "red-handed" in the process of a burglary. The testimony of the observers done provided proof beyond a reasonable doubt of the theft. The *Manual* ***for*** *Courts-Martial* lists the elements for larceny. The accused must take **an** item from the possession of another. The property must be of some value. The property must belong to some person. The property must be taken with the intent to deprive the rightful owner of its use and benefit. MCM, *supra* note **349,** ¶¶ 46(b)(1)(a)-(d). *All* of the facts necessary to find these elements already were known to the police before the questioning. ***See*** United States v. Vail and Brazier, **28** C.M.R. **358,358-59** (C.M.A. **1960).**

[551] In *Quillen*, for example, the COMA simply would have analyzed the objective beliefs of the suspect when confronted by the store security guard. Under the new test, the CAAF would analyze whether a reasonable soldier, confronted by an **AAFES** security officer, requesting his identification card, in the vicinity of the post exchange, could perceive the actions of the detective as constituting demands by a military superior. ***See,*** *e.g.,* United States v. Quillen, **27** M.J. **312, 313** (C.M.A. **1988).** Under the new test, it is possible that the CAAF still would find elements of military rank and authority present sufficient to suppress the statements. Thus, the CAAF could achieve the same result without the tortured analysis that it previously followed.

[552] BUGLE NOTES **39** (Zach Smith ed., **1977).** This excerpt from General Schofield's speech is one of the first things that a new cadet at the United States Military Academy must memorize. The words, like those of Article 31(b), are only meaningful if followed both in spirit and letter.

American military justice is a careful compromise between the dictates of discipline and obedience, and the strictures of constitutional law. The **UCMJ** accepts, endorses, and empowers a military that places one free American citizen under the control of another. It empowers that senior member to order the junior to fight, suffer, and if necessary, die. That same UCMJ seeks to insulate the administration ofjustice from that brutal but necessary power.

Article 31(b) stands as the guardian of the citizen soldier's right against self-incrimination. It is ***the service member's*** psyche that it protects. It is the ***service member's*** will that it shields. Time has long passed when the military courts should give any consideration whatsoever to the thoughts, motivations, or concerns of the questioner. The CAAF can, and should, act to restore the balance to military law that Article 31(b) established in 1951.

MYOPIC FEDERALISM THE PUBLIC TRUST DOCTRINE *AND* REGULATION OF MILITARY ACTMTIES

MAJOR RICHARD M. LATTIMER, JR.*

I. Introduction

The coastal areas of the United States are a valuable natural resource. This is true for commercial enterprise interests such as fishing[1] and oil production2 and for conservation or recreation interests.[3] It also is true for the United States military, and in particular, its naval services.[4]

World crises that spur United States action are likely to occur in the littoral[5] areas of the globe. While that has been true historically? recent changes in Department of the Navy doctrine reflect a shift in emphasis from open-ocean combat to amphibious operations.[7] Effective amphibious operations of any scale are charac-

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*United States Marine **Corps.** This article is based on a written thesis that the author submitted to satisfy, in part, the Master of Laws degree requirements of the 42nd Judge Advocate Officer Graduate Course at The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1]Commercial fishing is a multibillion dollar industry in the United States. The current Administration believes that the industry is mismrnaged at the national level and hopes to correct the situation. *Reauthorization of Ocean and Coastal Programs, 1993: Hearings Before the Subcom. on Oceanography, Gulf of Mexico, and the Outer Continental Shelf of the House Merchant Marine and Fisheries Comm.*, 103d Cong., 1st Sess. (1993) (statement of Diana H. Josephson, Deputy Undersecretary for Oceans and Atmosphere, National Oceanic and Atmospheric Administration).

[2]Offshore oil exploration has been an important aspect of coastal area management for some time. *See* ERNEST R. BAILEY, THE TIDELANDS OIL CONTROVERSY ch. 8 (1953). Efforts to find offshore oil deposits intensified following the 1973 Arab oil embargo. S. REP. NO. 277, 94th Cong., 2d Sess., 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1777 [hereinafter S. REP. NO. 2771.

[3]Congress is concerned over dwindling public lands along America's coasts. 136 CONG. REC. H8071 (1990). Through federal grants, Congress encourages states to acquire coastal lands in order to preserve or restore their "conservation, recreational, ecological, or esthetic values." 16 U.S.C. §1455a(b)(1) (West Supp. 1993).

[4]Naval services include the Marine Corps and the Navy, 10 U.S.C. § 5061 (West Supp. 1993), and, on a declaration of war or when determined by the President, the Coast Guard, 14 U.S.C. § 3 (1988).

[5]Littoral means "pertaining to the shore of a lake, sea, or ocean." THE RANDOM HOUSE COLLEGE DICTIONARY 783 (rev. ed. 1980). In a military context, littoral can mean within 650 nautical miles of the coastline. DEP'T. OF NAVY, FROM THE SEA 6 (1992) [hereinafter FROM THE SEA].

[6]*See, e.g.,* **UNWED** STATES MARINE CORPS, FMFM 1-2, **THE** ROLE OF THE MARINE CORPS IN *THE* NATIONAL DEFENSE ¶ 3006.e (1991); ALLAN R. MILLETT, *SEMPER FIDELIS:* THE HISTORY OF THE UNITED STATES MARINE CORPS (1980).

[7]FROM *THE* SEA, *supra* note 5, at 3.

terized by forces well trained and well rehearsed. Training and rehearsals may start out with simple map and sand table exercises, communications drills, and other types of mundane actions, but they must culminate in actual movement of ships, aircraft, and troops from deep water to beaches and further inland. This cannot be simulated. To attempt an amphibious operation without the coordination skills and lessons learned from actual training is to doom the operation to failure.

Realistic amphibious training cannot take place in a small area. Successful amphibious operations turn on their commanders' abilities to integrate the movement of aircraft, ships, submarines, landing craft, and ground forces into a coordinated attack. Changes in technology have forced commanders to plan to launch their assaults from over the horizon. If commanders are to train to do these things well, their forces cannot be constrained to operate in an unrealistically small space.

To find the requisite space, the United States may not be able to look overseas. America's military forces cannot count on training in foreign waters. Domestic budget shortfalls and international pressures are forcing the United States to close many of its overseas installations.[8] To accommodate this change but still remain a force in readiness, United States amphibious forces are going to have to train at home. This will increase the density of activity in an already crowded portion of America.

Competition for coastal resources is keen. People are flocking to the coasts. Currently, fifty-four percent of the United States population lives in coastal counties.[9] By the year 2000, eighty percent of the population will live within one hour's drive of the coast.[10] Coastal states and Congress recognize this trend and continue to seek new ways to apportion limited coastal resources.

One of the ways states are dealing with this problem is the public trust doctrine. The public trust doctrine is an ancient legal doctrine that places the state in a trustee relationship with the beneficiaries of the trust, its citizens. The corpus of the trust can be thought of in general terms as the coastal areas of the states.[11]

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[8] *See, e.g.*, Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Title XXIX, §§ 2901-2926, 2921, 104 Stat. 1496 (1990); ***see*** *also* Juan J. White, ***More Overseas*** *Bases* ***Closing,*** USA TODAY, July 2, 1993, at 1A.

[9] David Chew, ***Coastal Areas Face Threat of Destruction,*** STRAITS TIMES, Mar. 23, 1994, at 9.

[10] "CONNECTICUT DEP'T OF ENVIRONMENTAL PROTECTION, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK xxxiv (1990) [hereinafter PUBLIC TRUST DOCTRINE].

[11] "I define the corpus with more particularity. ***See*** *infra* text accompanying notes 62-103.

In this article, I analyze the application of the public trust doctrine to military activities in the coastal area. I begin by attempting to ascertain just what the public trust doctrine means throughout the United States.[12] My focus is on its evolution, its scope, and its administration. Next, I delve into the nature of coastal lands, the nature of federal lands, and the extent of federal power over lands. Once these preliminary steps are complete, I discuss the application of the public trust doctrine to military activities in the littoral areas of the United States. Following that discussion, I explore the question of whether a federal public trust doctrine exists and, if so, how it would affect the military-state relationships in coastal areas.

My discussion of the public trust doctrine and military activities takes the form of three challenges: (1) state legislative action that finds military activities incompatible with the public trust—a direct, broadside challenge; (2) state action to regulate military activities for minimizing their impact on the public trust; and (3) a citizen challenge to a state decision to license public trust land to the federal government for military training.

II. What is the Public Trust Doctrine?

In a very basic form, the public trust doctrine can be thought of as a legal tool to be utilized as either a means to protect trust assets or as an aid to decision making regarding those assets.[13] Courts, legislatures, government agencies, and even the public itself can use this tool. Its most recent application is to "direct and control economic growth and to prevent environmental degradation."[14] But to fully understand the role of the public trust doctrine in coastal area management, we need to look at its history.

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[12]Public trust doctrine varies from state to state. Phillips Petroleum Co., Inc. v. Mississippi, 484 U.S. 469, 475 (1988). Judges and commentators alike stress the need to examine the law of the state in which the dispute arises. Shively v. Bowlby, 152 U.S. 1, 26 (1894); 4 WATERS AND WATER RIGHTS §30.02(b) (Robert E. Beck, *ed.*, 1991); PUBLIC TRUST DOCTRINE, *supra* note 10, at xxxvi. This article attempts to define the public trust doctrine by describing the outer reaches of its power and applicability. Underlying the entire discussion is the question of the public trust doctrine's application to military activities. Accordingly, some aspects of the public trust doctrine that I identify may suggest extreme viewpoints. I make no claim to have developed a mainstream body of public trust law applicable in all fifty states.

[13]California's Supreme Court describes the public trust doctrine as "more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust." National Audubon Soc'y v. Superior Court of Alpine County, 656 P.2d 709, 724 (Cal. 1983).

[14]MOLLY SELVIN, THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789-1920, preface, 2 (1985).

A. Historical Development of the Public Trust Doctrine

Public trust commentators trace the public trust doctrine to ancient Rome.[15] Roman law treated navigable waters as a *res nullius*, a thing incapable of ownership.[16] Rivers, riverbanks, and harbors were *res communes*, things of common ownership for all Romans to use.[17] Similar notions of public ownership were prevalent in civil law nations such as France and Spain.[18] British law recognized the public trust doctrine, but with a twist to accommodate the monarchy: tidal and riparian lands and their associated waters were owned by the Crown, but for the most part available for use by all people.[19] This is significant because with the notion of sovereign ownership and control came a duty. The Crown had to either preserve the trust corpus for future generations or use the trust to benefit all people.[20]

British law divided ownership of these lands and waters into two parts, the *jus privatum* and the *jus publicum*. A person who held the jus privatum in these lands and waters did not hold the entire fee. Instead, the Crown held the *jus publicum* title to the property as trustee for the people. Thus a *jus privatum* owner had the use and enjoyment of such property subject to a dominant servitude exercised by the Crown.[21]

B. American Development of the Public Trust Doctrine

Although established in British law, the public trust doctrine lay dormant in post-revolutionary America. Jurists were reluctant to intrude upon the sanctity of private property ownership. The public trust doctrine was also too closely associated with the British government's control over property, and early Americans therefore recoiled at its use.[22]

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[15] PUBLIC TRUST DOCTRINE, *supra* note 10, at 4, 60; SELVIN, *supra* note 14, at 17. However, Professor Sax cautions, "neither Roman Law nor the English experience with lands underlying tidal waters is the place to search for the core of the trust idea." Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 186 n.6 (1980). Sax cautions against relying solely on history to discover the "core of the trust idea." *Id.* Instead, one should look to its purpose. He argues that the public trust doctrine slows the transformation of land over which the public has expectations from a "revolutionary" to an "evolutionary" pace. Sax asserts that "[t]he function of the Public Trust as a legal doctrine is to protect such public expectations against destabilizing changes." *Id.* at 188.

[16] *Id.*

[17] SELVIN, *supra* note 14, at 17

[18] Sax, *supra* note 15, at 189. Professor Sax indicates feudal law provided common areas for people to graze their animals, to fish, to hunt, and to cut peat for fuel.

[19] SELVIN, *supra* note 14, at 24.

[20] *Id.*

[21] PUBLIC TRUST DOCTRINE, *supra* note 10, at 7.

[22] SELVIN, *supra* note 14, chs, 1, 2.

Clashes between private and governmental property interests eventually caused American courts to turn to the public trust doctrine as a tool of economic policy.[23] First used in New Jersey in 1821,[24] the United States Supreme Court's initial encounter with public trust law came twenty-one years later in *Martin v. Waddell*,[25] another New Jersey case. An ejectment action, the dispute in *Martin* arose over the use of tidelands.[26] New Jersey granted the defendant a lease of certain tidelands for oyster farming. The plaintiff alleged he held the entire fee to the lands based upon titles directly flowing out of a grant from the King of England to his brother, the Duke of York, in 1664. If correct, the plaintiff would have prevailed because the state never had acquired an interest in the lands. A fee simple title directly from the King would have extinguished the *jus publicum* interest in the lands long before New Jersey became a state.

After a lengthy discussion concerning the title conveyed by the King, the Court found the King had conveyed the land in trust "for the benefit of the nation [Britain]."[27] The next step in the Court's analysis was to determine whether the King intended to transfer both the *jus privatum* and the *jus publicum* to private landowners, or to reserve the *jus publicum* "in trust for the common use of the new community to be established."[28] Consciously overlooking the clear language of the letters patent that transferred the land,[29] the Court turned to the King's intent.[30] It found he intended to preserve the sovereign's *jus publicum* for future British colonies, as was the custom at the time.

Two significant points arise from the Court's decision in *Martin v. Waddell*. First, the Court was willing to overlook private property rights and to find a superior interest in the New Jersey government. This action was especially severe because the plaintiff received no compensation for the loss—when land held in trust for the public is

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[23] *Id.* ***See infra*** text accompanying notes 62-103 for additional discussion of the public trust doctrine as a policy tool.

[24] Arnold v. Mundy, 6 N.J.L. 1 (1821).

[25] 41 U.S. (16 Pet.) 367 (1842).

[26] In this article, "tidelands" refers to lands that lie between the high and low water marks of the oceans. Distinguish these from "submerged lands" which are lands seaward of the low water mark. Tidelands are periodically exposed to the air. Submerged lands are always covered by water.

[27] Martin v. Waddell, 41 U.S. (16 Pet.) 367, 409 (1842).

[28] *Id.* at 411.

[29] Justice Thompson pointed out in his dissent, 'The absolute ownership could not be expressed in a more full and unqualified a manner." Id. at 429.

[30] Apparently, the Court thought that the King anticipated the American Revolution in his 1664 grant. The deed was not to be looked at as a deed conveying private property, but rather as "an instrument upon which was to be founded the institutions of a great political community; and in that light it should be regarded and construed." *Id.* at 411-12.

used for public benefit, an unlawful taking does not occur.[31] The Court could just as easily have said that one of the reasons for breaking away from Great Britain was to spurn unwanted government interference with private rights, and it could have discarded the public trust doctrine.[32] Second, the Court found that the legislature was the American equivalent of the Crown in determining who was to administer the trust.[33]

Three years later, the Supreme Court again spoke on the public trust doctrine in *Pollard's Lessee v. Hagan*.[34] That dispute began when Georgia ceded what is now Alabama to the United States. During the time the United States held the territory, it conveyed certain lands along the Mobile River to Pollard. Alabama later granted use of the same lands to Hagan. In another ejectment action, the parties called upon the Court to decide who held title. The Court found that the United States held the land in trust for Alabama until it became a state. When Alabama entered the Union, it did so on an "equal footing with the thirteen original states."[35] Thus, Alabama took from the United States the same sovereign control over its tidal lands as the thirteen original colonies took from Great Britain. Recoiling against the idea that the United States would convey a future state's sovereign interests in its lands, the Court found that the United States had conveyed less than the entire fee, merely the *jus privatum*, to Pollard. Alabama therefore received the *jus publicum* when it became a state.[36]

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[31]The Court reiterated this longstanding principle in Phillips Petroleum Co., Inc. v. Mississippi, 484 U.S. 469 (1988). Generally, neither a state nor the federal government can take private property without compensation. U.S. CONST. amends. V, XIV.

[32]Before leaving *Martin v. Waddell*, two other items are worth considering. The Court reiterated the rule of construction to construe grants of public lands to avoid conveying the jus publicum. *Martin*, 41 U.S. at 410. Second, the opinion took approximately twelve pages to summarize the facts. Indepth title research appears to be a common factor in public trust cases—ne that may complicate public trust litigation involving military installations. ***See,*** *e.g.*, the statutes that created the United States Naval Base located in Norfolk, Virginia. Act of March 20, 1794, ch. IX, 1 Stat. 345; Pub. L. 73-347, 48 Stat. 957 (1934). Further complicating title research will be the manners in which the United States acquires lands. ***See*** infra text accompanying notes 192-99.

[33]*Martin*, 41 U.S. at 410.

[34]44 (3 How.) U.S. 212 (1845).

[35]*Id.* at 223.

[36]In dicta, the Court indicated that the United States lacked the power to transfer both the jus privatum and the jus *publicum* to a private party:

> To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.

Pollard's Lessee served to clarify the position of states admitted to the Union after the Revolution with regard to public trust lands. The equal footing doctrine continues to play a part in American jurisprudence.[37] *Pollard's Lessee,* however, did nothing to delineate the boundaries of state and federal power in the same piece of public trust land. In its only statement on that issue, the *Pollard's Lessee* Court simply said, in dicta, that state control over tidal lands "can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution."[38] As a result of similar, very general statements by later courts, those powers remain largely unclarified even today.[39]

While courts have said very little on the precise relationship between the federal government and the states regarding public trust lands, they have defined the limits of a state legislature's power in its role as trustee. The seminal case in this area is *Illinois Central Railroad Co. v. Illinois.*[40]

C. Illinois Central Railroad

In the mid-nineteenth century, Chicago was becoming a hub for commerce moving in and out of the burgeoning American West. Congress desired to foster this growth. It authorized a grant to Illinois to help the state create a railroad to connect Chicago to the confluence of the Mississippi and Ohio Rivers, and to the Illinois and Michigan Canal.[41] Over the next several years, Illinois Central Railroad developed its line through the City of Chicago with the approval of the state legislature and the Chicago City Council.[42] In 1869, the legislature took an additional step that created a now famous controversy. Over the Governor's veto, it granted portions of

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Pollard's Lessee, 44 U.S. at 230. This was corrected in Shively v. Bowlby, 152 U.S. 1 (1893), where the Court held that the United States had the power to grant title to lands below the high water mark in fee simple to a private grantee. The lands involved in *Shively* lay along the Columbia River in the Oregon Territory. Exactly what power Congress has in this area remains unsettled. *See infra* text accompanying notes 458-505.

[37] Utah Div. of State Lands v. United States, 482 U.S. 193 (1986); Kleppe v. New Mexico, 426 U.S. 529 (1976); United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950); United States v. California, 332 U.S. 19 (1947); Shively v. Bowlby, 152 U.S. 1 (1893); State of Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990).

[38] *Pollard's Lessee,* 44 U.S. at 230.

[39] Illinois Central R.R. v. Illinois, 146 U.S. 387, 435 (1892); Stockton v. Baltimore and N.Y. R.R., 32 F. 9 (C.C. N.J. 1887); People v. California Fish Co., 138 P. 79, 89 (1913). *See infra* notes 468-69 and accompanying text.

[40] 146 U.S. 387 (1892).

[41] Act of Sept. 20, 1850, ch. 61, 9 Stat. 466.

[42] *Illinois Cent. R.R.,* 146 U.S. at 398-99.

the Lake Michigan shoreline and "'submerged lands constituting the bed of Lake Michigan"' to the railroad in fee simple — or so it thought.[43] The railroad was to have title to submerged lands lakeward out to one mile.[44]

Chicago's City Council was not in favor of the transaction. Since the city owned a portion of the lakebed that the state legislature had granted to the railroad, the legislature required the city to quitclaim the land to the railroad or forfeit its right to $800,000, part of the balance due by the railroad in consideration for the land.[45] Unpersuaded, the City of Chicago remained steadfast. Equally headstrong, the railroad proceeded to construct piers on the premise that the legislature's grant was sufficient authority.

During this period, the United States sued Illinois Central Railroad for interference with navigation on Lake Michigan. The parties reached a settlement and the War Department began to oversee construction of the railroad's piers.

In 1873, the Illinois legislature embraced the City of Chicago's line of thought, and it repealed the Lake Front Act.[46] Suit followed soon thereafter. The City of Chicago entered into the fray, but the United States declined to participate.47

Illinois Central argued the state had granted it the entire interest in the land in fee simple; the railroad claimed it held both the *jus privatum* and the *jus publicum*. Any attempt to repeal that Act, contended Illinois Central, constituted a violation of the Contracts Clause of the United States Constitution,[48] as well as a taking without compensation under the Fourteenth Amendment.[49] The state countered that the 1869 Act was invalid because it. lacked the Governor's approval.[50] It also implied it lacked the power to con-

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[43] *Id.* at 448 (quoting Illinois Laws of 1869, 245 (section 3 of the Lake Front Act)).

[44] *Id.*

[45] *Id.* at 407 (citing ILLINOIS LAWS OF 1869, 245 (section 6 of the Lake Front Act)). In addition to the balance due up front, the railroad was to pay seven percent of its gross earnings to the state in perpetuity. *Id.* at 448 (citing section 3 of the Lake Front Act).

[46] *Id.* at 411 (citing ILLINOIS LAWS OF 1873, 115).

[47] Justice Field noted "it was impossible to bring [the United States] in as a party without their consent." *Id.* at **433.** Had the United States been a party, the Court would have been in a position to answer significant questions discussed throughout this article concerning the relationship between a state and the federal government in the administration of public trust lands.

[48] U.S. CONST. ART. I, § 10, cl. 6.

[49] *Id.* amend. XIV.

[50] The state's argument was specious because it referred to a provision in the 1870 Illinois Constitution. The Lake Front Act was passed in 1869. Justice Field quickly discarded this argument and found the 1869 act procedurally valid. *Illinois Cent. R.R* , 146 U.S at 451.

vey the land under the public trust doctrine.[51] City attorneys were more direct. The city and the state held the lakebed in trust for the public, they argued, hence the legislature lacked the power to convey the entire title to that land to a private party.[52]

Justice Field's opinion for the Court probably went farther than any party anticipated. He not only struck down the 1869 Lake Front Act as invalid under the public trust doctrine,[53] but went on to say that certain aspects of the public trust can never be abridged

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, . . . than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.[54]

Exactly what portions of public trust lands can be alienated or otherwise disposed of, such as for military bombing ranges, remains a mystery. However, Justice Field contemplated two exceptions to the general rule against alienation.55 The first allows for disposition

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[51] *Id.* at 430.

[52] *Id.* at 420-22. The City of Chicago then went on to characterize the conveyance in a number of ways: the railroad took the land as a quasi-public agency; the railroad had a mere license; the state just gave the railroad an uncharacterized ability to use the land under its police power; the railroad had an easement; and the state simply made a revocable gift of the property. *Id.* at 423-28.

[53] Justice Field found no violation of the Contract Clause or due process because the state always had title to the lakebed—the attempted grant was "if not absolutely void on its face, . . . subject to revocation." *Id.* at 453.

[54] *Id.* at 453-54.

[55] Justice Field wrote:

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the land and waters remaining.

Id. at 453. At least one commentator believes that the second exception-disposition without impairment of the public interest—is limited to "small parcels" of submerged lands. PUBLIC TRUST DOCTRINE, *supra* note 10, at 178. I read no such limitation in the Court's language. Does a state violate the public trust doctrine if it leases a 1000-acre strip of tidal land (the amount involved in *Illinois Central)* to the military for installation and use of aviation electronic warfare training devices? Would that substantially impair the remaining public trust waters? Does it matter whether the public can still

of public trust lands to "further one of the values within the scope of the public right."[56] The second allows for disposition of a portion of the public trust lands if the overall value of the remaining lands is not "substantial[ly] impair[ed]."[57] Both of these exceptions create more ambiguity than they resolve.[58]

Another important aspect of the *Illinois Central* decision is the Court's treatment of the state legislature. After noting the economic importance of the harbor area to the City of Chicago,[59] Justice Field wrote:

> It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the State—should thus be placed elsewhere than in the people itself. . . . The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the right to the erection of wharves, piers and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country *at the **mercy** of a majority of the legislature* of the State in which the harbor is situated.[60]

Thus, unlike Congress's plenary power under the Property Clause of the United States Constitution,[61] a state legislature's ability to control the public trust is limited.

D. Scope of the Public Trust

What is the public trust doctrine designed to protect? That

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fish in the area? If the area is restricted to those who fish, but the restriction also serves to conserve wildlife, is that sufficient? Justice Fields's opinion answers none of these questions. Only through specific inquiry into the details of each case can a court determine whether a property transaction violates the public trust doctrine. *But **see*** County of Orange v. Heim, 106 Cal. Rptr. 825 (4th Dist. 1973).

[56] *Illinois **Cent.** R.R.*, 146 U.S. at 452-53.

[57] *Id.*

[58] *See infra* note ***60.***

[59] The area that the Illinois legislature attempted to convey to the railroad was:

> as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly if not quite equal to the pier area along the waterfront of the city of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York and Boston combined.

*Illinois **Cent.** R.R.*, 146 U.S. at 454. Justice Shivas in dissent chastised the majority for its emphasis on the economic value of the harbor. Either the public trust doctrine prevented the transfer of the land or it did not. The size or value of the land should be irrelevant. *Id.* at 467. ***See** supra* note 55.

[60] *Illinois **Cent.** R.R.*, 146 U.S. at 455 (emphasis added).

[61] U.S. CONST. art. IV, § **3,** cl. **2.** Congress's Property Clause powers are discussed further, ***see** infra* text accompanying notes 176-84.

question can best be answered by dividing the issue into three parts. First, what is the geographic reach of the doctrine? Second, what resources within that reach are protected? And finally, what is the nature of the public interest that the doctrine is intended to advance?

There are two characteristics concerning the scope of the public trust that must be kept in mind: variation and fluidity. Exactly what lies within the public trust varies from state to state.[62] Moreover, the public trust doctrine is a fluid concept, capable of changmg over time. As a result, one cannot easily distinguish those resources that are embraced by the public trust doctrine from those that are not.[63] Yet the task is not impossible. Once again, the historical development of the public trust doctrine provides some answers.

1. Geographic Reach—As taken from British law, the public trust doctrine only applied to navigable waterways that were subject to the ebb and flow of the tides.[64] The lands beneath these waters were also part of the trust corpus. Navigability was a question of law.[65] Thus, the public trust doctrine was of concern to jurists only when coastal areas of the United States were involved. As Americans moved into the interior reaches of the country, however, the public trust doctrine moved with them. Navigable rivers and lakes became part of the trust.[66] Tidal influence was no longer dispositive; neither was association with the sea. Navigability alone remained the determinative factor, and by this time navigability had become a question of fact.[67]

Recently, two decisions have shattered this reliance on navigability. In 1983, the California Supreme Court held, in National Audubon Society *v.* Superior Court *of* Alpine County, that the public trust "protects navigable waters from harm caused by the diversion of non navigable tributaries [of those waters]."[68] Thus, while not including non navigable waters in the trust corpus, the court never-

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[62]*See supra* note 12.

[63]New Jersey's Supreme Court recognized this aspect of the public trust doctrine in Borough of Neptune City v. Borough **of** Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972). "It is safe to say . . . that the scope and limitation of the [public trust] doctrine in this state have never been defined with any great degree of precision. That it represents a deeply inherent right of the citizenry cannot be disputed." *Id.* at 53.

[64]Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 486 (1988) (O'Connor, J., dissenting).

[65]Hardin **v.** Jordan, 140 **U.S.** 371, 383-84 (1891).

[66]Barney **v.** Keokuk, 94 **U.S.** 324 (1877). ***See*** *also* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435-37 (1892).

[67]The Daniel Ball, 77 **U.S.** (10 Wall.) 557, 563 (1871).

[68]National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 721 (Cal. 1983).

theless requires decision makers to consider the impact that diversion of those waters will have upon the corpus of the public trust proper.

Five years later, the Supreme Court complicated the issue still further in Phillips Petroleum *v. Mississippi*.[69] Called on to resolve a title dispute concerning lands embedded with oil and gas deposits, the Court determined that the State of Mississippi had public trust rights—the *jus* publicum—to tidal waters that were not navigable in fact. The Court also found that the waters need not be adjacent to the sea to fall within the trust corpus. While inland tidelands differ somewhat from coastal tidelands, the Court reasoned, "nonetheless, they still share those 'geographical, chemical, and environmental' qualities that make tidal waters unique."[70]

Attorneys must now exercise great care in delineating public trust boundaries. Although Phillips Petroleum is based only on Mississippi law, the value of coastal, riparian, and other water-laden lands makes the decision attractive authority for other states' courts to consider.[71] Similarly, the stakes in consumptive water-use adjudication—satisfying the public's domestic and industrial water needs versus potential eradication of riparian ecosystems[72]—make the Audubon holding attractive to conservation-oriented jurists.

In addition to the question of what types of water-laden lands are subject to the public trust doctrine, the issue remains regarding the inland reach of the trust corpus.[73] Historically, public trust

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[69]Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).

[70]*Id.* at 481 (quoting Kaiser Aetna Insurance Corp. v. United States, 444 U.S. 164, 183 (1979) (Blackmun, J. dissenting)).

[71]Indeed, the dissenters in Phillips Petroleum (Justice O'Connor wrote the dissenting opinion and was joined by Justices Scalia and Stevens) viewed the majority's expansion of the public trust corpus as a means to allow opportunistic states to take land without just compensation. Justice O'Connor adheres to the historical view, "Navigability, not tidal influence ought to be acknowledged as the hallmark of the public trust." *Id.* at 493-94.

Another aspect of the public trust doctrine illuminated by ***Phillips*** Petroleum is its harsh treatment of private property owners. The owners of the property in ***Phillips Petroleum*** had held title to the land and paid taxes on it for 100 years. In justifying its use of public trust law to extinguish their rights, the Court pointed out that Mississippi law on this matter had been clear for some time. Accordingly, the owners should have been on notice that they held merely the *jus privatum* in the land. *Id.* at 483.

[72]*See, e.g.*, Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 19811; United State v. Anderson, 736 F.2d 1358 (9th Cir. 1984); National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983).

[73]The seaward reach of the doctrine for coastal states is three nautical miles except for Florida's and Texas's jurisdiction into the Gulf of Mexico, where the outward reach is twenty-seven miles. ***See*** *infra* note **232** and accompanying text.

assets were fixed at the high water mark.[74] Some states, however, have taken the position that areas inland of the high water mark fall within the scope of the public trust corpus.[75] These decisions rest on the need to allow citizen access to traditional public trust resources. Their logic is that if some means of access across fastlands[76] are not provided by the doctrine, then universal public use of the trust's water-laden resources is fictitious.

Determining the geographic scope of the public trust corpus in a particular state now involves several steps. Taking the most expansive viewpoint, one must determine first if the area is subject to the ebb and flow of the tide. If so, it lies within the trust corpus. If not, the second step is to determine if the waters are navigable in fact. This analysis is more complex than it appears, because courts determine whether a body of water is navigable in fact by looking at the waterway as it existed at the time of statehood,[77] adjusted for accretion.[78] Expert testimony may be required. Waterways that are navigable in fact lie within the scope of the public trust;[79] water-

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[74]This refers to the highest point water reaches along the shore of a lake, river, or ocean. Under federal law, it is the average high water mark as measured over an 18.6 year period. Borax Ltd. v. Los Angeles, 296 U.S. 10 (1935). *See also* WATERS AND WATER RIGHTS, *supra* note 12, at 59. The difference between the high and low water marks can be the result of rainfall or other changes in river or lake levels. Thus, the term "high water mark" is not limited to areas influenced by the tide.

[75]*See, e.g.*, Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972). The authors of PUBLIC TRUST DOCTRINE, *supra* note 10, indicate this may be a trend. "A growing number of States recognize some public trust interests in privately owned 'dry sand' areas immediately upland of the mean high tide line, usually extending up to the vegetation or debris line." *Id.* at 57. *See infra* notes 343-55 and accompanying text.

[76]Fastlands are those dry lands inland of the high water mark.

[77]Utah v. United States, 403 U.S. 9 (1971); Alaska v. United States, 662 F. Supp. 455 (D. Alaska 1987), *aff'd*, 891 F.2d 1401 (9th Cir. 1989).

[78]Accretion is the gradual creation of dry lands from sediment carried by water. Accreted lands generally fall out of the trust corpus. Hilt v. Weber, 233 N.W. 159 (1930). Conversely, erosion enlarges the trust corpus. Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990). Sudden changes in lands because of storm, flood, or human action (*e.g.*, filling tidelands for construction) do not alter the geographic reach of the public trust doctrine. City of Alameda v. Todd Shipyards Inc., 632 F. Supp. 333, 335 (N.D. Cal. 1986). *See generally* PUBLIC TRUST DOCTRINE, *supra* note 10, ch. II (geographic scope of public trust doctrine).

[79]Once a waterway has been determined to be navigable, the entire lateral extent of the waterway lies within the scope of the public trust, not just the navigable portions. Swan Island v. Club, Inc. v. White, 114 F. Supp. 95 (E.D.N.C. 1953). A river can be navigable in its lower reaches and non navigable upstream. *State of Alaska*, 662 F. Supp. at 455. For a discussion on the tests used to establish navigability, see WATERS AND WATER RIGHTS, *supra* note 12, ch. 32. This determination is distinctly different from the question of navigability for Commerce Clause purposes. U.S. CONST., art. I, sect. 8, cl. 3. For example, note the broad definition of "waters of the United States" in 33 C.F.R. § 328 (1993) (implementing the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988)). Compare these to the United States Army Corps of Engineers regulations for navigability. *See* 33 C.F.R. § 329 (1993).

ways that are not navigable in fact are not part of the trust corpus itself. Nonetheless, one must determine whether they influence a waterway that lies within the public trust corpus. If so, then these nonnavigable waterways may figure in the overall decision regarding use of public trust resources. Finally, one must determine whether the state involved has extended the public trust corpus landward of the high water mark. Figures 1 and 2 illustrate the potential public trust assets in a given area.

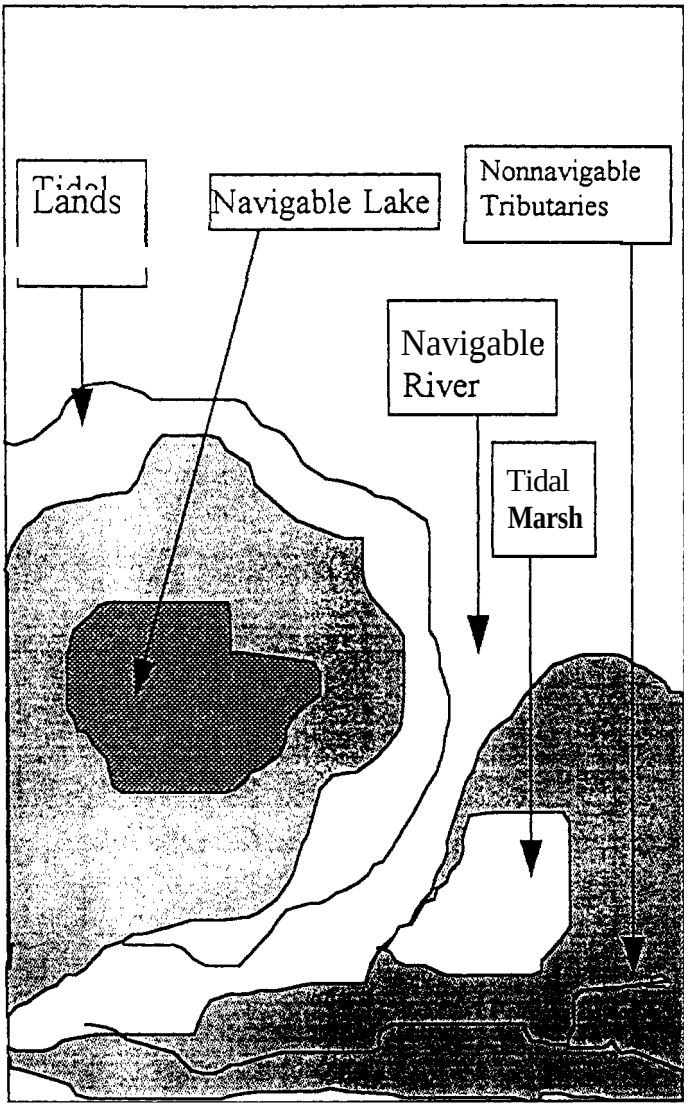

FIGURE 1

GEOGRAPHIC REACH OF **PUBLIC** TRUST DOCTRINE

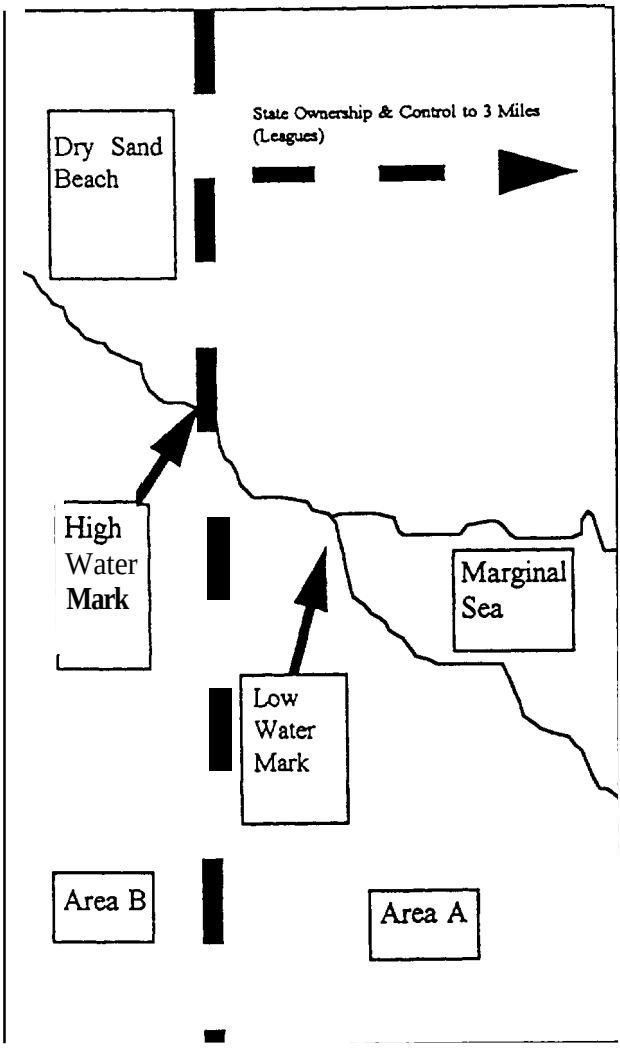

FIGURE 2

CROSS SECTION OF PUBLIC TRUST CORPUS

Area A: Established As Part of Trust Corpus

Area B: Possibly a Part of Trust Corpus; See State Law

2. Public *Dust* Resources—Originally used to protect lands and waters for commercial fishing and to foster the movement of goods in commerce,[80] the scope of the public trust doctrine has enlarged

[80]Martin v. Waddell, 41 U.S. (16 Pet.) 367, 414 (1842); Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892).

greatly. Now within its ambit are fish,[81] wild game,[82] waterfowl,[83] mineral resources,[84] and even whole ecosystems.[85] The public trust doctrine is a means available to enhance state management of these resources. In avoiding regulatory takings issues associated with its police power,[86] states can restrict or deny use of these resources as a part of their duties to preserve trust corpora.[87]

3. Protected *Public* Interests—Decisions concerning the proper way to use public trust assets involve a balancing process.[88] Public trust lands and waters and the living and mineral resources that occupy them are not inviolate, and the public trust doctrine is not designed to stagnate growth nor even to retard change.[89] The doctrine's purpose is to foster certain activities and to prevent others

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[81]People v. Monterey Fish Co., 195 Cal. 548 (1925). Fish include shellfish. McCready v. Virginia, 94 U.S. 391 (1876). Fish have been connected with the public trust since the doctrine's first use in this country *Martin*, 41 U.S. at 367; Arnold v. Mundy, 6 N.J.L. 1 (1821). Yet, until a few years ago, that connection was tangential. Fish originally were said to be owned by the several states in their sovereign capacities, rather than held by them as trustees. State v. Stoutamire, 131 Fla. 698 (1936); State v. Gallop 126 N.C. 979 (1900); State v. Hume, 95 P. 808 (Or. 1908); Dodgen v. Depuglio, 209 S.W.2d 588 (Tex. 1948). In Douglas v. Seacoast Products, 431 U.S 265 (1976), however, the United States Supreme Court declared the ownership of fish and other wildlife a legal fiction. "Neither the states nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures [wild fish, birds, and other animals] until they are reduced to possession by skillful capture." *Id.* at 284. This movement in the law was not unforeseen. For many years, courts had described the ownership of wild animals in terms of both ownership and a public trust. *See. e.g.*, Geer v. Connecticut, 161 U.S. 519 (1896) (sovereign ownership and public trust); New Jersey Dep't of Envtl. Protection v. Jersey Cent. Power and Light, 308 A.2d 671, 673 (N.J. 1973)("[W]ild animals, including fish, within the jurisdiction of the state, as far as they are capable of ownership, are included in the public trust."); State *ex rel.* Bacich v. Huse, 187 Wash. 75 (1936) (proprietary ownership and public trust). *Seacoast Products* ended the notion of ownership and left unimpaired the public trust aspect of this concept.

[82]*Gallop*, 126 N.C. at 979.

[83]*In re* Steuart Transp. *Co.*, 495 F. Supp. 38 (E.D. Va. 1980); *Jersey Cent. Power*, 308 A.2d at 671.

[84]Phillips Petroleum Co. **v.** Mississippi, 484 U S . 469 (1988).

[85]National Audubon Soc'y **v.** Superior Court of Alpine County, 658 P.2d 709, 521 (Cal. 1983). *Seegenerally* WATERS AND WATER RIGHTS, *supra* note 12, § 7.05(b).

[86]Nollan v. California Coastal Comm'n, 483 U.S. 825 (1986).

[87]PUBLIC TRUST DOCTRINE, *supra* note 10, ch. VII. Distinguishing a state's exercise of its police powers from the exercise of its public trust powers is not easy. Selvin characterizes their entanglement in this way: "the line between the state's police powers and its trusteeship responsibilities often becomes so muddled as to be virtually indiscernible." SELVIN, *supra* note 14, at 121.

[88]PUBLIC TRUST DOCTRINE, *supra* note 10; SELVIN, *supra* note 14, at 294. *See infra* text accompanying notes 107-40.

[89]It is inconceivable that the [public] trust doctrine should be viewed as a rigid prohibition, preventing all dispositions of trust property or utterly freezing as of a given moment the uses to which those properties have traditionally been put. It can hardly be the basis for any sensible legal doctrine that change itself is illegitimate.

Sax, *supra* note 20, at 186.

from occurring without careful and thorough consideration.[90] Just what those protected public interests are is a matter, it seems, for judicial, legislative, and agency determination.[91]

(a) Public Access—Courts in several states have held public access to be a purpose behind the public trust doctrine.[92] Such access is also recognized in some state statutes.[93] Concomitantly with these decisions and laws came an expansion of the purposes for which the public is to have access. Public trust jurisprudence now recognizes as protected public interests hunting,[94] sport fishing,[95] recreation,[96] pleasure boating,[97] and wildlife observation.[98]

(b) Conservation—Citizen access to public trust lands remains an important protected public interest, but it may be giving way to a new interest: conservation. Society's concern for the environment has manifested itself in a multitude of federal and state statutes and regulations.[99] This change in society's values—a desire by a majority

[90] In this regard, the public trust doctrine is much like the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988). For a further discussion, see *infra* text accompanying notes 413-23.

[91] When originally used in America, the public trust doctrine was purely a common law doctrine. It could expand or contract according to judicial determinations of the public interest. It has since been codified to some degree in several states. PUBLIC TRUST DOCTRINE, *supra* note 10, ch. VII. State agencies also have public trust responsibilities. *Id.* ch. VIII. See *infra* text accompanying notes 141-48.

[92] Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Orange v. Resnick, 94 A. 573 (Conn. 1920); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972); Tucci v. Salzhauer, 336 N.Y.S.2d 721 (1972), *aff'd*, 307 N.E.2d 256 (1973); State v. Baum, 38 S.E. 900 (N.C. 1901).

[93] North Carolina Coastal Area Management Act, N.C. GEN. STAT. §§ 113A-100 to 113A-134.9 (1989); CAL. PUB. RES. CODE §§ 30000- 30900 (1986 & 1994 Supp.). See *also* CAL. CONST. art. X, § 4 (1976).

[94] Swan Island Club Inc. v. White, 114 F. Supp. 95, 103 (E.D. N.C. 1953).

[95] Montana Coalition for Stream Access v. Curran, 682 P.2d 163 (Mont. 1984).

[96] California v. Superior Court, 625 P.2d 239 (1981).

[97] People v. Mack, 97 Cal. Rptr. 448 (1971); Tucci v. Salzhauer, 336 N.Y.S.2d 721 (1972), *aff'd*, 307 N.E.2d 256 (1973); Camaniti v. Boyle, 732 P.2d 989 (Wash. 1987).

[98] National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 719 (Cal. 1983).

[99] Marine Resources Sanctuaries Act, 16 U.S.C. §§ 1431-1445 (1988 & West Supp. 1994); Marine Mammal Protection Act, 16 U.S.C. §§ 1371-1407 (1988 & West Supp. 1994); Coastal Zone Management Act, 16 U.S.C. §§1451-1464 (1988 & West Supp. 1994); Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988 & West Supp. 1994); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988); National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991i (1988 & West Supp. 1993); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & West Supp. 1993); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988 & West Supp. 1993). State statutes include, e.g., The Porter-Cologne Water Quality Control Act, CAL. WATER CODE, §§ 13000-14050 (1992 & 1994 Supp.); California Coastal Act, CAL. PUB. RES. CODE §§ 30000-30900 (1986 & 1994 Supp.); CAL. HEALTH & SAFETY CODE, div. 20, ch. 6.5, §§ 25100-25249.100 (1992 & 1994 Supp.) [hazardous waste management); North Carolina Coastal Area Management Act, N.C. GEN. STAT. §§ 113A-100 to 113A-134.9 (1989); N.C. GEN. STAT. §§ 130A-290 to 130A-310.23 (1992 & 1994 Supp.) (hazardous waste management).

of Americans to place the environment ahead of commercial development—has taken place largely in the last two decades. Those interests that the public trust doctrine protects have shifted with this change in America's attitude. As the California Supreme Court said in 1971:

> There is a growing public recognition that one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[100]

Several other courts have recognized this shift and have altered their view of the public trust doctrine accordingly.[101] Likewise, some states have statutes that explicitly authorize preservation of public trust lands for ecological reasons.[102]

What does this mean for the American military and its need for training areas in the littoral waters of the United States? Legal machinations aside, at the very least it means that the Department of Defense must compete for the use of precious national resources—resources that are protected for commerce, navigation, fishing, public access, or to be preserved in their natural state.[103]

E. Administration and Control of Public Trust Assets

Exactly which branch of a state's government—judicial, legislative, or executive—administers and controls the public trust lands is unclear. When American courts adopted the public trust doctrine from British common law, they curiously made the people as a whole both trustee and beneficiary.[104] Under our system of government, the people are the sovereign.[105] Perhaps the early courts were simply struck by the nature of this dramatic concept and quite naturally substituted the people of the United States for the King in

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[100] Marks v. Whitney, 491 P.2d 374, 380 (1971). Although this was dicta by the court, nonetheless, it was an important indication of judicial attitude.

[101] *E.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988); California v. Superior Court, 625 P.2d 239 (1981); City of Berkeley v. Superior Court, 491 P.2d 362 (Cal. 1980); Saxon v. Division of State Lands, 570 P.2d 1197 (Or. 1979).

[102] CAL. PUB. RES. CODE §§ 30230, 30525; N.C. CONST. art. XIV, § 5, N.C. GEN. STAT. §§ 113A-113, 113A-115 (1989).

[103] Although I leave the precise issue of balancing these interests against the military's interests until later in the article, it is now useful to note that military uses of coastal lands conflict to varying degrees with all of these protected purposes. *See infra* text accompanying notes 310-457.

[104] *E.g.*, Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

[105] As expressed by Chief Justice Taney:

England whenever the occasion arose in a political context. Whatever the reason, this notion that the people of the several states are both the beneficiaries and trustees of the same trust is problematic.

Most important is the question of how the people as the sovereign express their will. Is a simple majority in a legislature sufficient? If so, on what basis does a court intervene? If a simple majority is not sufficient, what yardstick is a court or other governmental body to use when measuring the sovereign's intent? Finally, what role do state administrative agencies play in the management and control of public trust lands?

To simplify this discussion, I will divide the issue into two parts: questions involving alienation of public trust assets; and questions involving matters of less finality, such as the day-to-day administration of public trust lands. Both matters are of concern to the military. If a state sells public trust lands to the Department of the Navy, for example, it is unclear whether a court would treat the Navy as a private party or whether it would simply treat the alienation as furthering the public interest — national defense. The same is true for leases and licenses of public trust property to Department of Defense agencies. Likewise, because military activities do take place on public trust lands and will continue to do so,[106] it is useful to understand the duties of those agencies charged with the day-to-day administration of public trust property.

1. Alienation *of Public Trust* Lands — Alienation of public trust lands is not entirely prohibited,[107] nor is the action unreviewable by a court as a non justiciable political question.[108] Courts take the position that state legislatures can alienate at least portions of public trust lands[109] and that judges have some responsibility to review those actions. What is striking, however, is the different levels of scrutiny that courts utilize in answering such questions. For example, the Illinois Supreme Court and the United States Court of

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The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856).

[106] ***See supra*** **text accompanying notes 7-8.**

[107] ***See supra*** **text accompanying notes 41-61; see *infra* text accompanying notes 141-48.**

[108] **I have not found a case in which a court refused to review an alienation decision.**

Appeals for the Third Circuit (Third Circuit) approached similar problems in *People ex rel. Scott v. Chicago Park District*[110] and *West Indian* Co. *v. Government of the Virgin Islands.*[111] These cases involved alienation of public trust lands for commercial purposes,[112] construction of a steel plant, and construction of port facilities, respectively.

The Illinois opinion began with a statement on the importance of Lake Michigan to the people of the state, and then went on to say that "any attempted ceding of a portion of [the lake] in favor of a private interest has to withstand a *most critical examination.*"[113] In an effort to stave off judicial reproach, the Illinois Iegislature had issued a declaration that the grant to the steel company was within the scope of the public trust. It read:

> It is hereby declared that the grant of submerged land contained in this Act is made in aid of commerce[114] and will create no *impairment of the public interest in the Lands and waters remaining,* but will instead result in the conversion of otherwise useless and unproductive submerged land into an important commercial development to the benefit of the people of the State of Illinois.[115]

Note that the emphasized language is identical to the words used by Justice Fields in his *Illinois Central*[116] opinion. Clearly the legislature was trying to comply with, or perhaps circumvent, the rule in that case. The Illinois Supreme Court was not so easily assuaged, however. It simply said, 'Wejudge these arguments to be unpersuasive," and voided the conveyance.[117]

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[109]Likewise, I have not found a jurisdiction in which a legislature cannot do so.

[110]360 N.E.2d 773 (Ill. **1976).**

[111]844 F.2d 1007 (3d Cir. 1988).

[112]I discuss alienation of public trust lands to private parties for this reason: there are times when a court might treat the United States as a proprietor rather than a sovereign. ***See*** infra text accompanying notes 435-42.

[113]People ***ex*** *rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 780 (Ill. 1976) (emphasisadded).

[114]Whether this reference to commerce was simply a decision to strictly follow the rationale of the Supreme Court in Illinois Central R.R. v. Illinois, **146** U.S. 387 (1892), or whether it represents a failure on the part of the Illinois Legislature to keep pace with the evolution of the public trust doctrine is unclear. In any event, the court's concern was to protect the environment for future generations. "On this question of changing conditions and public needs, it is appropriate to observe that there has developed a strong, though belated, interest in conserving natural resources and in protecting and improving our natural environment." Scott, 360 N.E.2d at 780 (***See*** *supra* text accompanying notes 88-103 (protected public interests).

[115]*Scott*, 360 N.E.2d at 781 (emphasis added).

[116]*Illinois* Cent. *R.R.,* 146 U.S. at **453.**

[117]*Scott*, 360 N.E.2d at 781.

West Indian Company is remarkably similar to Illinois Central. In 1982, the Virgin Islands legislature ratified an agreement transferring land to the West Indian Company. When dredging started as a result of the conveyance in 1986, "an immediate public uproar" arose,[118] and the legislature called itself into special session to repeal the previous act of ratification. Confronted with the question of whether the original conveyance fell within the exceptions created in Illinois *Central*,[119] the court first noted it must "carefully scrutinize any conveyance of submerged lands to determine if [the conveyance] is in complete congruence with the fiduciary obligations owed to the public by the *sovereign*."[120] This is similar to the approach used by the Scott Court. Yet the Third Circuit's subsequent characterization of its duty to review the legislature's determination is markedly different. It avowed to defer to the legislature "[i]f the conveyance represents a deliberate and reasonable decision of the sovereign that the transaction of which the conveyance is a part affirmatively promotes the public interest in submerged lands."[121] Because the legislature made such a decision in 1982, the court upheld the conveyance.[122]

Although the West Indian Company decision was made many years after the Scott decision, the Third Circuit's lower level of scrutiny does not mean *Scott* should be disregarded. To the contrary, sixteen years after *Scott*, a federal district court heard a case involving a conveyance of public trust land in Lake Michigan to Loyola

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[118] West Indian Co. v. Government of the Virgin Islands, 844 F.2d 1007, 1014 (3d Cir. 1988).

[119] *See* supra text accompanying notes 41-61.

[120] *West* Indian Co., 844 F.2d at 1019 (emphasis added). Note that the court uses the word "sovereign" to refer only to the legislature, not the people. The court offers no explanation for this treatment of the people as subjects of the sovereign, rather than as the sovereign themselves. See supra notes 104-05 and accompanying text. Perhaps this is simply a clue to the court's deferential attitude toward the legislature.

[121] *West* Indian Co., 844 F.2d at 1019 (emphasis added). As authority for this standard of review, the court cited a law review article and two treatises, "Sax, The Public *Trust* Doctrine *in* Natural Resource *Law*, 68 MICH. L. REV. 471 (1970); W. Rodgers, ENVIRONMENTAL LAW § 2.16 (1977); 1 V. Yannecone & B. Cohen, Environmental Rights and Remedies § 2.3 (1972)." Id. It did not cite People ex *rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773 (Ill. 1976).

[122] The Third Circuit considered the matter in West Indian Company on appeal from a grant of a motion for summary judgment by the district court. Thus, it viewed the facts in a light most favorable to the parties that sought to overturn the conveyance. West Indian Co., 844 F.2d at 1015-16. Economic matters were at the heart of the court's decision. Transferring the land would have enabled the West Indian Company to expand the width of a public highway from two lanes to four, dredge the harbor to benefit navigation and thereby increase tourism, and create more jobs by developing the waterfront. Id. at 1019-20. Undoubtedly, the Third Circuit would have upheld the Illinois Legislature's action in Scott because that conveyance fostered commerce as well.

University.[123] Using *Scott* as authority, it struck down the conveyance despite these previous actions: (1) a finding by the Illinois legislature that the "public would benefit from the lakefill in various ways";[124] (2) issuance of a dredge and fill permit by the United States Army Corps of Engineers;[125] (3) a finding by the Army Corps of Engineers that the conveyance and fill project would *not* "significantly affect the quality of the human environment" under the National Environmental Policy Act;[126] (4) a finding by the Army Corps of Engineers that the project would not interfere with navigation under the Rivers and Harbors Act;[127] (5) approval of the project by the City of Chicago; (6) a determination that the lakefill would partially halt erosion of the shore along Loyola University's property; (7) an agreement that Loyola University would construct a 2.1-acre park on the filled land to which the public would have unrestricted access, as well as an agreement to allow citizen use of additional university sports facilities subject to reasonable restrictions;[128] and (8) insertion of a right of reentry clause into the conveyance to allow the state to reestablish title to the land if Loyola University ever ceased to operate as a private, nonprofit entity.[129] In rescinding the grant, the court chose not to "yield to [the Illinois legislature's] specific . . . consideration of the public interest."[130] Instead, it noted:

> The very purpose of the public trust doctrine is to police the legislature's disposition of public lands. If courts were to rubber stamp legislative decisions, as Loyola advocates, the doctrine would have no teeth. The legislature would have unfettered discretion to breach the public trust as long as it was able to articulate some gain to the

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[123] Lake Mich. Fedn v. United States Army Corps of Engineers, 742 F. Supp. 441 (N.D. Ill. 1990).

[124] *Id.* at 443 (quoting ILLINOIS STATUTES, Public Act 85-1145, S.B. 1171).

[125] *See infra* text accompanying notes 388-400.

[126] *See infra* text accompanying notes 413-23.

[127] *See infra* text accompanying notes 388-400.

[128] *Lake Mich. Fed'n*, 742 F. Supp. at 442-43. In this case, the court returned to the public access purpose of the public trust doctrine and stated:

> Loyola ignores the fact that the public will have to sacrifice 18.5 acres of publicly held land in order to obtain a coastline to which it has unlimited access. Moreover, it glosses over the fact that the public is actually gaining nothing. The public currently has unrestricted access to the submerged lands which will become the new coastline. In reality, the public is losing its right of access to the portion of the lake which would become the interior portion of the lakefill.

Id. at 446. For additional discussion of protection of public access under the public trust doctrine, *see infra* text accompanying notes 198-309.

[129] All eight subparagraphs come from *Lake Mich. Fed'n*, 742 F. Supp. at 445.

[130] *Id.* at 446.

> public. . . . Therefore, we find that the legislative determination that the lakefill would serve the public is no obstacle to our conclusion that the grant was in breach of the public trust.[131]

The *Lake Michigan Federation* court focused its attention on the action of the Illinois legislature. It did not attach any significance to the actions of the City of Chicago. More importantly for this discussion, the court ignored the decisions made by a federal agency, the Army Corps of Engineers.[132]

These cases demonstrate that courts will review alienation of public trust lands, but that the level of review varies from one end of the spectrum to the other. Under the "deliberate and reasonable" standard, courts will defer to legislative findings. When a court is willing to challenge a legislature's actions, however, what forms the basis of the court's decision?[133] That is, upon what does a court rely to determine the public's interests?[134]

For an answer to this question, we must briefly return to *Scott* and to *Lake Michigan Federation.* Both these decisions rest on a rather simple premise: alienation of public trust lands is prohibited unless the alienation benefits the public directly. ***An*** incidental economic benefit in the form of more jobs for Chicagoans was found to

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[131] *Id.* The district court permanently enjoined the conveyance and lakefill. On motion for reconsideration, the court refused to either discard the public trust doctrine as a "narrow ideology", or carve out an exception for nonprofit entities. Reversal of law for policy reasons alone, the court noted, is a matter for state courts. Id. at **449.**

[132] No indication is made in the court's opinion as to whether Loyola University's attorneys argued that the actions by the Army Corps of Engineers preempted review under the public trust doctrine. Arguably, the Corps' duties to protect navigation under the Rivers and Harbors Act, **33** U.S.C. §§ 401-467n (1988), to protect the environment under the Federal Water Pollution Control Act, **33** U.S.C. §§1251-1387 **(1988&** West Supp.), and to evaluate actions that have the potential to significantly affect the quality of the human environment (a very broad mandate, *see* **40** C.F.R. pts. **1500-1508 (1993))** under the National Environmental Policy Act, **42** U.S.C. §§4321-4370a (1988), mirror the duties of the state legislature as trustee under the public trust doctrine. *See infra* text accompanying notes **458-505** regarding the question **of** whether a federal public trust doctrine exists. *See also infra* text accompanying notes **310-457** on the ability **of** the state to challenge military activities under the public trust doctrine. The United States Supreme Court made nothing of the Army Corps **of** Engineers' role in Illinois Central's construction of piers in Lake Michigan. Illinois Cent. R.R. **v.** Illinois, **146** U.S. **387** (1892).

[133] Justice Field's opinion in *Illinois Central* stresses the need to protect the public interest from the "mercy of a majority of the legislature." *Illinois Cent.* R.R., **146** U.S. at **455.** Thus, from a purely legal view, the Scott and *Lake Michigan Federation* courts applied the correct standard of judicial review. From a policy viewpoint, however, the answer may be different. *See infra* note **137.**

[134] This question takes on added importance if a federal public trust doctrine exists, because federal courts would be called on to review congressional public trust decisions. *See infra* text accompanying notes 458-505.

be insufficient.[135] The *Lake Michigan Federation* court characterized this as a purpose analysis. If the primary purpose of the alienation is to benefit the public, then the conveyance falls within the *Illinois Central* exception and does not violate the public trust.[136] Conversely, when the purpose of the alienation is to allow a university to expand its athletic facilities, as in *Lake Michigan Federation*, the public does not benefit sufficiently, and the grant is void.

From a military standpoint, the primary purpose test is not helpful. It gives courts so much latitude in defining the public's interest that one cannot anticipate judicial decisions with any certainty.[137] This situation is somewhat improved in those states that have public trust statutes, or better yet, public trust provisions in their constitutions.[138] In those states, judges are not called upon to determine public interests from common law precedent, the arguments of counsel, or their own experiences. Instead, the people have defined those interests. This puts military attorneys in a better position to anticipate the outcome of public trust litigation.

Of course, the negative aspect of states with statutorily or con-

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[135]Lake Mich. Fed'n v. United States Army Corps of Engineers, 742 F. Supp. 441, 445 (N.D. Ill. 1990); People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773, 781 (Ill. 1976).

[136]For this premise, the court cited People *ex rel.* Maloney v. Kirk, 45 N.E. 830 (Ill. 1896) (alienation of public trust lands upheld because the purpose was *to* extend Lake Shore Drive for the benefit of the public).

[137]The activistic role taken by judges like those in *Scott* and *Lake Michrgan Federation* strengthens the public trust doctrine because one cannot determine the precise nature of the public interest in the trust lands until the judge rules. Such anxiety over the unknown will likely act to reduce alienation of public trust lands; legislators will be hesitant to act, as will developers and creditors.

Some commentators refer to judicial scrutiny of legislative decisions in this area as "antidemocratic" or "antimajoritarian." ***See*** WATERS AND WATER RIGHTS, *supra* note 12, at 326-27; Huffman, *Trusting the Public Interest to Judges*, 63 DEN. U. L. REV. 565, 576 (1986). If Sax, *supra* note **15,** is correct, however, and the role of the public trust doctrine is to slow down development until carefully considered, then perhaps an active judicial role is proper in public trust jurisprudence. Careful judicial review protects the disorganized majority from organized "narrow private interests." WATERS **AND** WATER RIGHTS, *supra* note 12, at 326.

Consider *West Indian Company*. In that case, the West Indian legislature responded to public pressure to repeal its prior act. One can surmise that the initial grant of lands went through the legislature with little public attention paid to it. Only after the company began to dredge the harbor did the public make its feelings known.

Yet the environmental and conservation lobbies in Congress and the states are stronger today than ever before. So the fear that oil companies and real estate development companies will slide legislation past the public without notice is probably unfounded. Moreover, groups like the Sierra Club, the National Audubon Society, and the National Resources Defense Council are just as much special interest groups as real estate and petroleum industry lobbying organizations. When one speaks of courts protecting the interests of the silent and disorganized majority of Americans in public trust cases, this simply is not the case.

[138]*See infra* text accompanying notes 332-434 (California and North Carolina constitutional and statutory provisions).

stitutionally defined public trust interests is that courts are constrained by those definitions. Judges could not, on their own accord, place national defense within the public interest as defined by state law. If military agencies desire that goal, they will have to turn to the state's political process. This differs from states with purely common law-based bodies of public trust law. Conceivably, in those states, a court could find national security within the interests protected by public trust law.

There are likely to be many occasions where a state's common law, statutes, or constitution do not include national security as a protected public interest. To uphold military use of public trust lands in those instances, a court would have to rely on an expression of a superior federal right. This involves much more than a mere recitation of the Supremacy Clause.[139] Federal statutes and policies accommodate state public trust interests to such a degree that judges will have to search carefully to find an expression of federal superiority, if one exists at all.[140]

2. Day-to-Day Administration *of* Public Trust Assets—Courts appear to distinguish alienation from day-to-day management of public trust resources. Generally, only legislatures have the power to alienate public trust property,[141] but state administrative agencies have authority to make significant decisions regarding the use of those resources.[142] State agency decisions involve not only the balancing of competing uses of public trust resources,[143] but also the regulation of activities that occur on public trust property. For example, Florida's Board of Trustees for the Internal Improvement Trust Fund[144] has the power to issue leases for public trust property. It can include in those leases provisions regulating the lessee's con-

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[139]U.S. CONST., art. VI, cl. 2.

[140]***See infra*** text accompanying notes 443-57.

[141]In some jurisdictions, state agencies have the power to alienate public trust lands. ***See, e.g.,*** Kootenai Environmental Alliance **v.** Panhandle Yacht Club, 671 P.2d 1085 (Idaho 1983).Yet such power is narrowly construed:

> Despite generally liberal attitudes toward most exercises of agency power [under the public trust doctrine], courts have tended to take a narrow view of a legislature's delegation of authority in connection with the alienation of public trust lands, and such decisions made by non-elected agencies rather than the legislature itself will be subjected to closer scrutiny than will legislative decision making.

PUBLIC TRUST DOCTRINE, ***supra*** note 10, at 284.

[142]***Compare*** People **v.** California Fish Co., 138 P.2d 79 (Cal. 1913) (alienation) ***with*** National Audubon Soc'y **v.** Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983) (State Water Resources Control Board has authority to balance public trust interests against Los Angeles's need for consumptive water).

[143]***National Audubon Soc'y,*** 658 P.2d at 709; United Plainsmen Association **v.** North Dakota Water Conservation Commission, 247 N.W.2d 457 (N.D. 1976).

[144]FLA. CONST. art. X, § 11; FLA. STAT. ANN. $253.01 (West 1993).

[145]***Id. See also*** PUBLIC TRUST DOCTRINE, ***supra*** note 10, at 240-44.

duct.[145]

When relying on state agency actions, military officials should exercise caution to ensure that those agencies' powers are not unconstitutionally broad. North Carolina's Department of Natural and Economic Resources was successfully attacked on a claim of an unconstitutional delegation of power by the state legislature.[146] Florida's Division of State Planning, however, avoided a similar claim.[147]

One practical difficulty that military officials are likely to encounter is the number of agencies vested with public trust responsibilities in each state. This not only means multiplying the military's efforts to satisfy each agency's needs, but also it may result in contradictory opinions from the different agencies.[148]

F. Standing

One of the most troublesome aspects of the public trust doctrine from the military viewpoint is that it provides citizens with a vehicle to challenge military activities that affect public trust property. Imbedded in the public trust doctrine is the state's duty to preserve the trust corpus through wise management. Some people believe this duty rises to a fiduciary level.[149] Others believe it necessary to reduce the level of duty to account for the trust's unique nature.[150] In either case, public trust law allows individuals to sue to enforce their rights as beneficiaries.151

Lengthy negotiations and meetings with the myriad of state agencies discussed above may not be the end of the road for military planners. Rather, they may find themselves faced with a court battle against citizens opposed to the proposed military activity and dissat-

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[146]**Adams v.** North Carolina Department of Natural and Economic Resources, **249** S.E.2d 402 (N.C. 1978).

[147]**Askew v.** Cross Key Waterways, 372 So.2d 913 (Fla. 1978).

[148]PUBLIC TRUST DOCTRINE, *supra* note 10, at 240.

[149]New Jersey Dep't of Envtl. Protection v. Jersey Cent. Power and Light, 308 A.2d 671,674 (N.J. 1973); WATERS AND WATER RIGHTS, *supra* note 17, at 22.

[150]PUBLIC TRUST DOCTRINE, *supra* note 10, at 326-32.

[151]National Audubon Soc'y **v.** Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983); Akau **v.** Olohana Corp., **652** P.2d 1130, 1134 (Haw. 1982); City of Wilmington v. Lord, 378 A.2d 635 (Del. 1977); State **v.** Deetz, 244 N.W.2d 407 (Wisc. 1974); Askew **v.** Hold the Bulkhead-Save Our Bays, 269 So. 2d 696, 697 (Fla. 1972) (public trust doctrine affords standing if plaintiff demonstrates "special injury"); Paepcke **v.** Public Building Comms'n, 263 N.E.2d 11 (Ill. 1970).

[152]Consider the confrontation between the National Audubon Society and Los Angeles County over the Mono Lake watershed. That suit began in 1979 and was still ongoing nine years later. National Audubon Soc'y v. Department of Water, 869 F.2d 1196 (9th Cir. 1988). California was a party and opposed Audubon's position.

isfied with the actions of state regulatory agencies.[152] Again, this goes back to the problematic nature of the public trust doctrine—citizens have dual roles as both trustees and beneficiaries.

G. Ability to Revisit Decisions Affecting the Public Trust as Resources Degrade

Coupled with the citizen standing aspect of the public trust doctrine is a notion that could give people more frequent access to courts and regulatory boards. California's Supreme Court made a statement in *National Audubon Society v. Superior Court of Alpine County*[153] that has received little attention, yet stands to cause great concern among those involved in public trust matters. The court indicated that the state water board could reallocate water *without regard to its previous decisions-even those in which it considered the public trust doctrine.*[154]

Based upon their duties to continually supervise the public trust, state agencies could use *National Audubon* as authority to void an agreement affecting the use of public trust resources whenever those resources began to degrade. Exactly what form and amount of degradation would be necessary before a court or administrative board would revisit a public trust decision is not discussed in *National Audubon*. Granted, state and federal regulatory agencies can impose stricter conditions on environmental permits when military negotiators renew them. But those permits have fixed terms,[155] and the military can anticipate and prepare fo'r their renewal. *National Audubon's* statement has no such notice provision.

Of greater significance is the potential for citizens to use this language to continually challenge public trust use agreements. California's Supreme Court makes no mention of whether citizens have the same power as state agencies. As a matter of trust law, however, affording the trustee more power than the beneficiaries have to maintain the trust assets is illogical.

Because citizens can sue to enforce the trust, there are apt to be more collisions between the public trust doctrine and military activities. Military officials will not be able to shield their services from the application of public trust law by simply relying on state agencies. They may need to do more. How much more depends both

[153] 658 P.2d 709 (Cal. 1983).

[154] *Nat'l* Audubon *Soc'y*, 658 P.2d at 728.

[155] A water pollution permit under the National Pollutant Discharge Elimination System has a term of no more than five years. 40 C.F.R. §§ 122.46, 123.25(a)(17) (1993). A hazardous waste treatment, storage, and disposal permit under the Resource Conservation and Recovery Act (Part B permit) has a term of no more than ten years. 40 C.F.R. §§ 270.50, 271.13 (1992).

on the types of challenges raised and the strength of the federal government's claim to the lands involved. Next, I will turn to that strength (or weakness).

III. Nature of the Federal-State Relationship in Coastal Lands and Waters

As a creature of state common law, codified in some instances the public trust doctrine is subject to the Supremacy Clause of the United States Constitution.[156] The Supremacy Clause shields federal activities from the application of state law through sovereign immunity and the preemption doctrine. However, not all state laws that purport to regulate federal activities in the littoral regions of the United States fall victim to the Supremacy Clause. Various aspects of the relationship between federal and state governments in those areas serve to stifle assertions of superior rights by the federal government. Two of these aspects, general federal powers over lands and federal statutory schemes affecting coastal lands and waters, merit additional attention.

A. Federal Interests in Coastal Lands

Federal power over lands comes primarily in two forms: sovereign power and Property Clause power.[157] The extent of those powers depends to some degree upon both the nature of the federal interest in the lands and the manner in which they were acquired. **A** state's ability to apply its public trust law to federal lands hinges, then, on the degree to which federal power over lands accommodates state law.

1. Types *of* Federal Interests — Federal interests in coastal lands span the entire range of property law. They include interests held in fee simple, interests leased or licensed from state or private parties, and mere use agreements.[158] The federal government can acquire lands in many ways. It can purchase land outright.[159] It can condemn land using its eminent domain power.[160] It can retain land acquired through discovery or conquest rather than turn it over to the states.[161] Land so retained is in the public domain unless withdrawn

[156] U.S. CONST. art. VI, cl. 2.

[157] *Id.* art. IV, § 3.

[158] 10 U.S.C. § 2663(c) (1988); 32 C.F.R. pt. 644, subpt. C, **Real** Estate Handbook (1993).

[159] 10 U.S.C. §§ 2663(c), 2672, 2672a (1988).

[160] 10 U.S.C. § 2663(a) (Condemnation); 32 C.F.R. §§ 644.111 to 644.121 11993).

[161] Shively v. Bowlby, 152 U.S. 1 (1893).

for specific purposes, such as a military reservation.[162] Finally, the federal government can obtain land for navigational purposes by exercising its dominant servitude over lands under navigable waters.

2. Federal Power over Lands

(a) Commerce Clause Power and the Navigational Servitude — Congress's Commerce Clause authority is a sovereign, not a proprietary, power. Accordingly, it applies over all United States lands and into the surrounding sea.[163] Congress need not consult with states about its use. "[I]n this matter, the country is one, and the work to be accomplished is national; and . . . state interests, state jealousies, and state prejudices do not require to be consulted."[164]

"Commerce includes navigation."[165] This means Congress can authorize both the destruction of impediments to navigation[166] and the construction of aids to navigation.[167] When its powers are so exercised in navigable waters, the federal government need not compensate the affected landowner, including state governments, because all lands under navigable waters are burdened by a dominant federal servitude.[168]

Originally limited solely to navigational matters, the naviga-

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[162]For a brief discussion of reserved versus nonreserved federal lands, ***see*** Federal Power Commission v. Oregon, 349 U S . 435, 443-44 (1955).

[163]Toomer v. Witsell, 334 U.S. 385 (1948); Wickard v. Filburn, 317 U.S. 111 (1942); Skiriotes v. Florida, 313 U.S. 69 (1941); Manchester v. Massachusetts, 139 U.S. 240 (1891); Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

[164]Stockton v. Baltimore and N.Y. R.R., 32 F. 9, 17 (C.C. N.J. 1887).

[165]Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724 (1865). ***See*** *also* Ogden, 22 U.S. at 197 ('The power of congress, then, comprehends navigation, within the limits of every state of the Union.").

[166]United States v. Chicago, M., St. P., and P. R.R., 312 **U.S.** 52 (1941). Congress has delegated to the Secretary of the Army, as supervisor of the Army Corps of Engineers, broad powers to regulate the nation's navigable waters:

> It shall be the duty of the Secretary of the Army to prescribe such regulations for the use, administration, and navigation of the navigable waters of the United States as in his judgment the public necessity may require for the protection of life and property, or of operations of the United States in channel improvement, covering all matters not specifically delegated to some other executive department.

33 U.S.C. § 1 (1988).

[167]*Stockton*, 32 F. at 9.

[168]Lewis Blue Point Oyster Cultivation Co. v. Griggs, 229 U.S. 82 (1913); United States v. Chandler-Dunbar, 229 US. 53 (1913); Stockton, 32 F. at 9. Because all lands beneath navigable waters in the United States are burdened by the servitude, exercise of the servitude does not result in a transfer of title. James v. Dravo Contracting Co., 302 US. 134 (1937). ***See*** *also* 32 C.F.R. § 644.2(d) (1993).

tional servitude has grown in scope much like the Commerce Clause and now serves as the authority cited to build locks and dams,[169] to construct bridges,[170] and even to prevent development of lands that would destroy estuarine ecosystems.[171] Courts have not circumscribed the entire range of its application, but navigational servitude does have limits.[172] The servitude extends to the high water mark,[173] not beyond.[174] And, while federal agencies may use it to ensure naval as well as commercial vessels are able to transit waterways, they cannot use it for military purposes unrelated to navigation.[175]

(b) Property Clause—Control over federal lands pursuant to the Property Clause is both sovereign and proprietary.[176] Congress's power under the Property Clause is plenary.[177] It includes the ability to protect animals on public lands,[178] to restrict the use of electricity generated on public lands,[179] and to dispose of minerals within public lands.[180] Whether the Property Clause allows Congress to regulate activity that takes place on adjacent non federal lands is unclear.[181] Congress may also authorize the sale of federal property. In keeping with its plenary authority, Congress excluded disposition of public lands from review under the Administrative Procedures Act.[182]

Federal law applies to all federally held lands, but not necessarily to the exclusion of state law. Both governments have interests

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[169]*Dravo Contracting* Co., 320 U.S. at 134.

[170]*Stockton*, 32 F. at 9.

[171]Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970). Army Corps of Engineer regulations require the Corps to conduct a public interest review before it issues a permit under the Rivers and Harbors Act. 33 C.F.R. § 320.4 (1993). Curiously absent from the factors it must directly consider in that review is national defense.

[172]United States v. Kane, 602 F.2d 491 (2d Cir. 1979).

[173]United States v. Chicago, M., St. P., and P. R.R., 312 U.S. 52 (1941).

[174]United States v. Rands, 389 U.S. 121 (1967).

[175]United States v. 50 Right of Way or Servitude in, on, over, and Across Certain Lands Situated in Bayonne, Hudson County, N.J., 337 F.2d 956 (3d Cir. 1964).

[176]Light v. United States, 220 U.S. 523 (1911).

[177]Kleppe v. New Mexico, 426 US. 529 (1976); United States v. San Francisco, 310 U.S. 16 (1939); Light v. United States, 220 US. at *523.*

[178]*Kleppe,* 426 U.S. at 529.

[179]United States v. San Francisco, 310 U.S. at 16.

[180]United States v. Trinidad Coal Co., 137 U.S. 160 (1890).

[181]The Supreme Court opted not to comment on this issue in ***Kleppe; see Kleppe,*** 426 U.S. at 546.

[182]5 U.S.C. §§ 551(13), 553(a)(2), 701(b)(2) (1988) (read these sections together to understand the exception). ***See*** Ono v. Harper, 592 F. Supp. 698 (D. Haw. 1983). Contrast federal taking of private property, which is reviewable under the Administrative Procedures Act. ***See*** 5 U.S.C. §§ 551(10), 551(13), 701(b)(2) (1988); Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981) ***reversed*** *on* ***other grounds sub*** *nom.,* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

in such lands. The question of federal preemption of state law turns on congressional intent and the nature of state interests.[183] If Congress did not intend to preempt state authority on public lands, then state law applies absent a conflict with federal law.[184]

(c) War Powers—Under its War Powers, Congress has some regulatory authority over land and water.[185] A more precise description of that authority is impossible, because both Congress and the courts appear reluctant to utilize such power.[186] Courts have had opportunities to expand Congress's War Powers over navigable waters, but they never have taken that opportunity. At most, judges have ambiguously rooted their decisions in both Congress's national defense and Commerce Clause powers.[187] As courts expanded the Commerce Clause power, they turned less and less to the War Power.[188] Even the statute that authorizes the Secretary of the Army to establish restricted areas in navigable waters for military live-fire training is grounded in both war and Commerce Clause powers.[189]

At the very least, Congress has the power to provide facilities for the nation's armed forces and to appropriate funds for their training. These powers flow directly from the words of the Constitution.[190] Because the states have no national defense pow-

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[183] *Compare* Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981) *with* United States v. Anderson, 736 F.2d 1358 (9th Cir. 1984).

[184] California Coastal Comm'n v. Granite Rock, 480 U.S. 572, 580 (1987).

[185] U.S. CONST. art. I, § 8, cls. 12-14, 16, 17.

[186] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 *passim* (1952) (plurality opinion) (Frankfurter, J., concurring); BAILEY, *supra* note 2, at 39, 41, 111-13 (Navy unsuccessfully attempted to get Congress to assert its War Powers authority over submerged lands).

[187] Ashwander v. TVA, 297 U.S. 288 (1936) (plurality opinion) (construction of a dam and powerplant for munitions production a valid exercise of both Congress's War Powers and Commerce Clause power); Greenleaf Johnson Lumber Co. v. Garrison, 237 U.S. 251 (1915) (congressional ability to regulate navigation includes ability to provide mooring facilities for United States Navy vessels); Bailey v. United States, 62 Cl. Ct. 77 (1926) (congressional power over navigation allows it to take lands for naval purposes). *Contra* United States v. 50' Right of Way or Servitude in, on, over, and Across Certain Lands Situated in Bayonne, Hudson County, N.J., 337 F.2d 956 (3d Cir. 1964); United States v. 412.715 Acres of Land, Contra Costa County, Cal., 53 F. Supp. 143 (N.D. Cal. 1943).

[188] "[T]he likelihood of [Congress using its War Powers to regulate navigable waters] in an era of expanded Commerce Clause authority . . . is questionable. WATERS AND WATER RIGHTS, *supra* note 17, § 35.05.

[189] 3 U.S.C. § 3 (1988). The statute reads in part, "In the interest of the national defense, *and for the better protection of life and property on the navigable waters of the United States. . . .*" *Id.* (emphasis added).

[190] "The Congress shall have Power. . . . To raise and support Armies . . . ." U.S. CONST. art. I, § 8, cl. 12. 'The Congress shall have the Power. . . To provide and maintain a Navy[.]" *Id.* art. I, § 8, cl. 13. "The Congress shall have the Power. . . . To make Rules for the Government and Regulation of the land and naval Forces[.]" *Id.* art. I, § 8, cl. 14.

ers,[191] however, there will never be a direct conflict between a state defense statute and a federal defense statute. If conflicts arise, they will occur because states and the military services have different concerns about lands used for military training. Unless these concerns clash head on, there will always be room to accommodate state interests regarding military lands.

(d) Manner *of* Acquiring Lands — Another factor in the equation of state authority over federal lands is the manner in which the federal government acquired such property. State law generally governs real property transactions that involve the federal government.[192] When state law specifically disadvantages the federal government, however, federal law applies.[193]

When the federal government acquires land by condemnation, conquest, or discovery, states have no property interests in those lands.[194] On the other hand, lands which the federal government acquires by purchase or donation can contain provisions that allow states to retain some property interest, including a public trust, *jus* publicum, interest.[195] Congress has the power to extinguish state interests in those instances, but courts require evidence of congressional intent before they will supplant state law.[196] States that lease or license their lands to the federal government do not subject themselves to this uncertainty; they retain full ownership interests in the leased or licensed lands.[197]

B. Statutory Schemes and Intergovernmental Relations

The relationship between the federal and state governments in coastal lands and waters is not linear. State power does not begin where federal power ends. Instead, they usually coexist. Congress has fostered this coexistent relationship with two pieces of legislation: the Submerged Lands Act[198] and the Coastal Zone Management Act.[199]

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[191] *See* United States v. Curtis-Wright, 299 U.S. 304 (1936).

[192] United States v. Little Lake Misere Land Co., 412 U.S. 580, 590-92 (1973).

[193] State *ex rel.* California Coastal Commission v. United States, 457 U.S. 273, 280 (1982); *Little Lake Misere*, 412 U.S. at 592-94.

[194] *California ex rel. State Lands Commission*, 457 U.S. at 273; United States v. 11.037 Acres of Land, 685 F. Supp. 214, 216 (N.D. Cal. 1988); State of California v. United States, 512 F. Supp. 36, 38 (1981). *Contra* United States v. 1.58 Acres of Land, 523 F. Supp. 120 (D. Mass. 1981). ***See*** *infra* text accompanying notes 463-505 (discussing in greater detail the case of *United States v. 1.58* ***Acres).***

[195] State of California v. United States, 512 F. Supp. 36, 44-45 (1981); City of Alameda v. Todd Shipyards Inc., 635 F. Supp. 1447, 1450 (N.D. Cal. 1986) (Todd II); City of Alameda v. Todd Shipyards Inc., 632 F. Supp. 333, 337 (N.D. Cal. 1986).

[196] *Todd II*, 635 F. Supp. at 1450.

[197] 32 C.F.R. pt. 644, Real Estate Handbook (1993).

[198] 43 U.S.C. §§ 1301-1314 (1988).

[199] 16 U.S.C. §§ 1451-1464 (1988 & West Supp. 1994).

Both of these Acts enhance state public trust law. They also broadly define the relationship between military activities and state regulatory schemes in America's littoral regions. The turbulent history of the Submerged Lands Act, in particular, demonstrates Congress's willingness to subordinate federal concerns to issues of state sovereignty. Central to that history is the struggle for control over offshore oil deposits.

1. Conflict *Over Oil* in *Submerged* Lands — In 1937 the Secretary of Interior, Harold Ickes, reversed his own longstanding determination that the federal government could not issue leases for the development of offshore oil wells.[200] His reason was to claim the offshore oil for national defense needs.[201] Prior to 1937, the Department of Interior believed that only states had the authority to issue offshore oil leases because they owned the lands.[202] One year later, Ickes had a bill introduced in Congress to declare the federal government as owner of submerged lands.[203]

That bill never passed, but it spawned a flurry of related legislation. Oil leasing revenues were a significant source of income for coastal states.[204] Money aside, however, both coastal and inland

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[200] H. REP. NO. 1778, 80th Cong., 2d Sess. (1950), *reprinted in* 1953 U.S.C.C.A.N. 1417 [hereinafter H. REP. No. 1778]. *See generally* BAILEY, *supra* note 2, ch. 8.

[201] Some members of the Senate supported Secretary Ickes's policy reversal. In a report to the President in 1939, the Senate Natural Resources Committee indicated its desire to assert federal control over oil deposits in the marginal sea.

> Another problem affecting petroleum reserves which merits attention here is that of national policy toward ownership of petroleum and natural gas lying beneath submerged areas off the coast of the United States between low-water mark and the 3-mile limit. Unsettled questions of law are involved, but the very existence of doubt offers an opportunity for the bold assertion of the national interest in any petroleum or natural-gas reserves that may be found beneath those areas. It is one of the unfortunate errors of our national development that early in our history the public ownership of all subsurface mineral wealth was not declared; such a step would have been so simple at an early stage and would have meant so much in terms of [petroleum] conservation, and it would be so complex and costly at this stage — not to speak of the wastes of irreplaceable resources that have already taken place. But here and now in 1939 we have one last opportunity to take steps which will reserve to the nation petroleum deposits that may be of considerable extent.

Hearings on S.J. Res. 83 and 92 Before the Senate Natural Resources Comm., 76th Cong., 1st Sess., 21 (1939), *quoted in* BAILEY, *supra* note *2,* at 104.

[202] Mr. Ickes's position was, 'Title to the soil under the ocean to the 3-mile limit is in the State of California, and the land may not be appropriated except by authority of the State." H. REP. NO. 1778, *supra* note 200, at 1417.

[203] S.J. Res. 208, 75th Cong., 3d Sess. (1938). *See also* BAILEY, *supra* note 2, at 101-04.

[204] United States v. California, 332 U.S. 19, 23 (1947). *See generally* BAILEY, *supra* note 2.

states were wary of what many viewed as a federal land grab. Congress passed two bills that would have quitclaimed United States interest in such lands to the coastal states. President Truman vetoed them both.[205]

Meanwhile in court, the federal government asserted its ownership over submerged lands and filed suit in 1946 to eject California from that property. The Supreme Court heard the case, *United States v. California*,[206] on the basis of its Article III "original jurisdiction" powers.[207] Justice Black's majority opinion made short work of California's lengthy arguments.[208] Finding that no one could own the marginal sea[209] or the lands underneath it, the Court looked instead to the question of control. Because the marginal sea is associated with national defense and international commerce, the Court determined the federal government to be the appropriate seat of power. No compensation to California was necessary, in the Court's view, because the state had never owned the lands.

Similar actions involving both Texas and Louisiana yielded identical results.[210] State reaction was nearly unanimous[211] and charged with emotion. The Texas Legislature called for the impeachment of Justice Douglas, author of the Texas decision.[212] One of the reasons for such solidarity among the states was the manner in which Justice Black characterized the federal government's authority over submerged lands. He framed the question before the Court as

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[205]92 CONG. REC. 10,803 (1946); 93 CONG. REC. 6253 (daily ed. May 29, 19521.

[206]United States v. California, 332 U.S. at 19.

[207]U.S. CONST., art. III, § 2. Both parties agreed to try the case based on legal argument alone; the Court heard no evidence. United States v. California, 332 U.S. at 24.

[208]California's original answer totalled 822 pages. SHERIDAN DOWNEY, THE TRUTH ABOUT THE TIDELANDS 29 (1948). Among the arguments California advanced, was that it held the lands in fee simple because of a "long-existing Congressional policy of acquiescence in California's . . . ownership" and that the United States Attorney General lacked power to file suit because Congress did not specifically authorize him to do so. United States v. California, 332 U.S. at 24, 27.

[209]The marginal sea extends from the low water mark to seaward to three miles. Thomas Jefferson helped fix the limit at three miles because that was the range of cannon shot in his day. *Id.* at 33. President Reagan extended the limit to twelve miles in 1988, Proclamation No. 5928, 54 Fed. Reg. 777 (1988), but Congress made no corresponding change to the Submerged Lands Act. ***See*** 43 U.S.C. §§ 1301(b), 1312 (1988 & West Supp. 1994).

[210]United States v. Louisiana, 339 U.S. 699 (1950); United States v. Texas, 339 U.S. 707 (1950).

[211]Forty-six of forty-eight states supported quitclaim legislation, a fact which Bailey terms "little short of phenomenal." BAILEY, *supra* note 2, at 148. Additionally, 43 states filed amicus briefs with the Supreme Court in favor of a rehearing of *United States v. California. Id.* at 186. Unanimity was never reached in Congress, however, where one of the quitclaim bills President Truman vetoed passed the Senate by just ten votes. *Id.* at 156 (citing 92 CONG. REC. 9642 (1951)).

[212]BAILEY, *supra* note 2, at 212 (citing N.Y. Times, Jan. 17, 1951).

whether the "Federal Government has the *paramount right and power* to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered may be exploited."[213] He found that the federal government had that right and power because of its sole responsibilities for interstate and international commerce as well as its duty of national defense.[214] This pronouncement has come to be known as the paramount powers doctrine.

Confusion over this new doctrine was rampant.[215] Some state officials took the doctrine to mean the federal government could take any state property without compensation so long as it based its need for the property on national defense or commerce.[216] Congress heard itself described in various terms, none of which was laudatory.[217]

In 1953 Congress passed, and President Eisenhower[218] signed, the Submerged Lands Act.[219] It legislatively overruled the result of the *California, Louisiana,* and *Texas* cases.[220] However, the Act may

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[213]United States v. California, 332 U.S. 19, 29 (1947) (emphasis added).

[214]*Id.* at 34-36.

[215]DOWNEY, *supra* note 208, at 56-57.

[216]BAILEY, *supra* note 2, at 149-50. At the very least, the Supreme Court's pronouncement served to cloud the titles of submerged lands in the marginal sea. Some feared that this would lead to problems securing investors for offshore oil development. Id.

[217]The House Committee on the Judiciary said, 'We have heard it described in such terms as 'novel,''strange,' 'extraordinary and unusual,' 'creating an estate never before heard of,' 'a reversal of what all competent people believe the law to be,' 'creating a new property interest,' 'a threat to our constitutional system of dual sovereignty,' 'a step toward the nationalization of our natural resources,' 'causing pandemonium,' etc." H. REP. NO. 1778, *supra* note 200, at 1419.

[218]United States v. California, 381 U.S. 139, 186 (1965) (Black, J., dissenting). At a meeting in 1950, President Truman had tried to reassure Texans that the federal government was not out to steal its oil revenues. BAILEY, *supra* note 2, at 195. Nevertheless, his steadfast refusal to sign quitclaim legislation undoubtedly cost him the support of some members of Congress. Id. at 215.

[219]43 U.S.C. §§ 1301-1315 (1988 & West Supp. 1994).

[220]The United States Supreme Court has been careful to preserve the rationale of its holding in United v. California, 332 U.S. 19 (1947), by distinguishing between the results of its decision and the means used to arrive at it.

> We held [in the *California, Louisiana,* and *Texas* cases] that the United States, not the States, had paramount rights in and power over such lands and their products, including oil. Congress accepted our holdings as declaring the then-existing law—that these States had never owned the offshore lands—but believed that all coastal States were equitably entitled to keep the submerged lands they had long treated as their own, without regard to technical legal ownership or boundaries. Accordingly, Congress exercised its [paramount] power by passing the Submerged Lands Act.

United States v. Louisiana, 363 U.S. 1, 86 (1960) (Black, J., dissenting and concurring).

not have ended debate on one important concept: the nonownership theory in submerged lands.

Some scholars[221] were of the belief that no nation or government was capable of owning lands beneath the oceans: a *res nullius* theory, as discussed above.[222] These academicians even applied that notion to a nation's marginal sea. Justice Black seized upon that theory and, in an imperfect and unclear manner, used it as the basis for his decision in *United States v. California*.[223] Justice Douglas did

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[221] Principal among them was Professor William L. Bishop, Jr., of the University of Michigan Law School. H. Rep. No. 1778, *supra* note 200, *reprinted in* 1953 U.S.C.C.A.N. 1473 (minority report).

[222] *See supra* text accompanying notes 15-21.

[223] His use was imperfect because the theory ultimately must lead to the public trust doctrine if it is to have any usefulness. To say that no one owns submerged lands beneath the world's oceans is to say that whoever has the superior power is able to use these lands. In terms of the three-mile belt surrounding the marginal sea, that power clearly rests with the United States government. But Justice Black was not concerned with use alone. He also was concerned with wise use of the resources in those lands. This was the very premise behind the United States action against California—oil companies as regulated by California were unwisely managing coastal oil deposits. United States v. California, 332 U.S. 19 (1947); H. REP. NO. 1778, *supra* note 200, *reprinted in* 1953 U.S.C.C.A.N. 1440 (minority view); BAILEY, *supra* note 2, chs. 7, 8. Control of coastal resources and the duty to use them wisely are the very heart of the public trust doctrine, yet Justice Black makes only an offhand reference to it ("The [federal] Government which holds it interests here as elsewhere in trust for all the people shall not be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property. . . ." United States v. California, 332 U.S. at 40). Had Justice Black utilized the public trust doctrine as the basis for his decision, the states would not have been any less emotional in their responses, but attorneys would not have been left scrambling to determine the nature and limits of Black's nonownership theory.

Justice Black's use of the nonownership theory also was unclear. In his opinion, he seems to indicate United States control of submerged lands rests first on ownership and then on the use of its paramount powers. The question before the Court, as he framed it, was "not *merely* who owns the bare title to the lands under the marginal sea," it was whether the United States had the greater political interest in those lands, *Id.* at 29 (emphasis added). He answered the question in this manner, "Not only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty." ***Id.*** at **34.** Left alone, these words indicate that the United States owns and has sovereign control, versus merely a proprietary interest in, submerged lands. Yet in the decree ordering California to quit the lands, the Court refused to include language suggested by the Solicitor General denoting that ownership of the lands rested in the United States. *See* United States v. Texas, 339 U.S. 707, 724 (Frankfurter, J., dissenting).

The confusion is now obvious. In its argument before the Court in both *United States u. Louisiana* and *United States v. Texas*, the United States claimed that it either owned the lands in fee simple "or [was] possessed of paramount rights in, and full dominion and power over [the lands]." *Id.* at 701, 709. Justice Douglas, in his opinion in *United States v. Texas*, found that Texas owned the submerged lands off its coast when it was a republic, but relinquished its ownership upon its admission into the Union; a finding inconsistent with the nonownership theory. ***id.*** at 707, 717. Justice Douglas then found that the United States had control over the lands—but stopped short of saying that it owned them. Once again, both decrees issued by the

likewise in his *United States v. Louisiana* and *United States v. Texas* opinions.[224] The concept is important because of its logical progression into public trust theory,[225] and because courts continue to muddle through the distinction between sovereign control and ownership even today.[226]

In the Submerged Lands Act, Congress chose to discard Black's nonownership theory and vested the states with "title to and ownership" of submerged lands.[227] Although the Act has survived judicial scrutiny, the question of whether the United States can quitclaim ownership of something it never possessed has never been answered.[228] This may become important if a state ever brings an inverse condemnation action against the United States for interference with its use and possession of submerged lands.[229]

2. Submerged Lands Act—The Submerged Lands Act restored any public trust powers the states may have lost under the *California, Louisiana,* and *Texas* decisions. Of greater importance to this article, the Act may have given the states limited public trust power over federal government activities as well.

Congress chose to reaffirm the states' titles to submerged lands under inland and tidal waters, as expressed in several Supreme

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Supreme Court in the *Texas* and *Louisiana* cases omitted the ownership language requested by the United States. United States v. Louisiana, 340 U.S. 899 and 900 (1950).

Courts continue to struggle with the notion of nonownership. Contrast the opinions of Justice Reed and Justice Black in Alabama v. Texas, 347 U.S. 272 (1954) (per curium) (nonownership) with the majority opinion in United States v. California, 381 U.S. 139, 167 11965) (Court referred to submerged lands seaward of the three-mile limit as "property rights belonging to the United States").

[224] *See supra* note 223.

[225] *See id. supra. See also infra* text accompanying notes 458-505, regarding a federal public trust doctrine.

[226] United States v. California, 447 **U.S. 1,3** (1980) (United States owns all submerged lands seaward of three-mile limit); United States v. California, 381 U.S. 139, 167 (1965) (referring to United States as having "property rights" in submerged lands); Alabama v. Texas, 347 US. 272 (1954) (per curium) (referring to submerged lands as "belonging to the United States"); United States v. Texas, 339 U.S. 707, 717 (1950) (Texas used to "own" submerged lands in the Gulf of Mexico.).

[227] 43 U.S.C. § 1311(a)(1) (1988).

[228] The Supreme Court glossed over this question in its 26-line per curium opinion sustaining the constitutionality of the Submerged Lands Act in *Alabama v. Texas.* Both Justice Black and Justice Douglas, authors of the *California, Louisiana,* and *Texas* decisions, dissented over the cavalier treatment of the issue by the majority, yet the issue has not arisen since.

[229] *See infra* text accompanying notes 427-34 (discussing inverse condemnation further).

Court decisions,[230] and to link them with titles to submerged lands seaward of the low water mark.[231] All of these inland lands have been linked historically to the public trust doctrine: they are part of the trust corpus. By linking them to submerged lands in the marginal sea, Congress affirmatively extended the states' public trust reach seaward to three miles.[232] No doubt of this remains.[233]

What is in doubt is the extent of federal power over submerged lands in the marginal sea. For although Congress disregarded Justice Black's nonownership theory when it vested ownership rights in the states, it chose to use his language in reference to the powers retained by the United States:

> The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established,

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[230]Shively v. Bowlby, 152 U.S. 1 (1893); Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); Pollard's Lessee v. Hagan, 4 (3 How.) 212 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842).

[231]43 U.S.C.§ 1311(a)(1) (1988). The Act lumps these lands together under the definition of "lands beneath navigable waters." *Id.* § 1301(a).

[232]The seaward limit of Florida's and Texas's control extends three marine leagues into the Gulf of Mexico. United States v. Louisiana, 363 U.S. 1 (1960); United States v. Florida, 363 U.S. 121 (1960). The Act does not foreclose assertions by states that their seaward boundaries extend farther than three miles, but it fixes those assertions in time. 43 U.S.C. § 1312 (1988). *See also* United v. Alaska, 112 S. Ct. 1602 (1992) (United States could force Alaska to waive any claims it may have had under the Submerged Lands Act before it granted the City of Nome a Rivers and Harbors Act permit to extend its coastline seaward).

[233]Curiously, both the Act and its legislative history, H. REP. No. 215, 83d Cong., 1st Sess., (1953) (with appendices), *reprinted in* 1953 U.S.C.C.A.N 1385-1640, are devoid of more than casual references to the public trust doctrine. Yet the language of the Act clearly preserves the public trust rights of states out to the three-mile limit. Section 1311(a) states

> It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) *the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance applicable State law* be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States.

(emphasis added). Whether or not Congress had the public trust doctrine in mind when it passed that language into law, the breadth of that declaration is sufficient *to* encompass all aspects of the public trust doctrine.

> and vested in and assigned to the respective States . . . by section 1311[234] of this title.[235]

Congress's primary purpose in enacting the Submerged Lands Act was to release to the states any federal interests in oil deposits under the marginal sea.[236] When viewed from that perspective, the Act's language makes sense. The federal government is to have no role in the control of oil and gas leases in the marginal sea. If the federal government needs the oil for national defense, it has priority rights to buy it "at the prevailing market price."[237] Separation of federal and state authority under the Act, however, is not limited to the issue of oil deposits. The Act references lands and natural resources without limitation.[238]

Three factors complicate the process of isolating those instances in which the federal government can exercise its authority in the marginal sea from those instances when it cannot: Justice Black's paramount powers doctrine; the breadth of Congress's Commerce Clause[239] powers; and the Act's language.

Congress did not know what to make of its newfound paramount powers.[240] While quitclaim advocates had the votes to give the states power over oil in the marginal sea, Congress could not entirely cede its authority over that area of land and water. Once Congress has constitutional power, however derived, it cannot relinquish it.[241] In this regard the Court had Congress in a box. Congress had to use language in the statute sufficient to convince the Court that the federal government had no interest in offshore oil, but that language could not be so broad as to abdicate Congress's paramount powers. Obviously Congress succeeded. The Submerged Lands Act was held as constitutional. But perhaps the reason for the Court's simplistic treatment of the constitutionality of the Act in its per curium opinion in *Alabama v. Texas*[242] was its recognition of the difficulty in drafting language to effectuate congressional intent. As the Court was aware of the political ramifications of its decision,[243] it might have opted to

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[234] *See supra* note 233.

[235] 43 U.S.C. § 1314 (emphasis added).

[236] H. REP. NO. 695, 82d Cong., 1st Sess., (1951), *reprinted in* 1953 U.S.C.C.A.N. 1398 [hereinafter H. REP. NO. 695].

[237] 43 U.S.C. § 1314(b) (1988).

[238] *Id.* § 1301(e).

[239] U.S. CONST. art. I, § 8, cl. 3.

[240] *See supra* notes 215-17 and accompanying text.

[241] Alabama v. Texas, 374 US. 272, 282 (1954) (per curium) (Douglas, J., dissenting).

[242] *Id.* at 272.

[243] "This Court's holding [in United States v. California, 332 U.S. 19 (1947)] precipitated one of the most hotly contested political issues of the post-war decade." United States v. California, 381 US. 139, 185 (1965) (Black, J., dissenting).

rely on Congress's intent, and thereby avoid the need to delve further into the distinction between state and federal authority.

Congress chose to limit the federal government's authority in the marginal sea to "commerce, navigation,[244] national defense, and international affairs."[245] If such legislation had been adopted in the early years of this country's existence, the statute would be easier to understand. Nineteenth century American courts limited Congress's powers in navigable waters to these same three areas.[246] Yet today, Commerce Clause power is pervasive, going well beyond any traditional definition of "commerce."[247] Thus, for the statute to limit federal authority in the marginal sea to matters dealing with commerce, is to place no limit on the federal government's power at all.

Federal officials who try to ascertain the scope of their authority in the marginal sea are now faced with a dilemma. If a court reads the statute literally, taking into account the present breadth of Congress's Commerce Clause authority, then federal authority will almost always prevail. On the other hand, if the court determines the language to be ambiguous, and looks to congressional intent, the result might be a curtailment of federal authority. With such a broad spectrum of possibilities, one is left uncertain.

The few judicial decisions that seek to clarify the scope of federal power in the marginal sea range this spectrum. The cases also highlight the ambiguity of the language in the Submerged Lands Act. For example, in construing the seaward extent of a state's authority under the Act, the Supreme Court said the United States had "no interest" in the "lands, minerals, and other natural resources" inland of the federal-state boundary.[248] Likewise, it was deemed inappropriate for a court to exercise admiralty jurisdiction over a case involving submerged lands governed by the Act because the state owned those lands.[249] Yet the Army Corps of Engineers (ACOE) can take into account conservation of the environment when it makes a decision concerning a request for a dredge and fill permit of submerged lands.[250] Congress's Commerce Clause power gives the ACOE that authority. Under the same delegated power, the ACOE may also be able to consider public access to beaches.[251] Finally,

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[244] The United States navigational **powers** are further delineated in 34 U.S.C. § 1311(d) (1988).

[245] 43 U.S.C. § 1314(a) (1988).

[246] Pollard's Lessee v. Hagan, 4 (3 **How.)** 212, 280 (1845).

[247] WATERS AND WATER RIGHTS, ***supra*** note 12, ch. 35.

[248] United States v. Louisiana., 363 U.S. 1, 84 (1960).

[249] Moore v. Hampton Roads Sanitation Distr. Comm'n, 57 F.2d 1030 (4th Cir. 1977).

[250] Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).

[251] United States v. Kane, 602 F.2d 491 (2d Cir. 1979).

because of a need to protect the superior interest of the United States, federal-state property disputes rest upon federal, not state, law.[252]

One way to attempt to explain this confusion is to distinguish property rights from police power regulation. This would justify the Supreme Court's current nullification of United States interests in the marginal sea, and support the other decisions cited above. If correct, this distinction means the federal government can "regulat[e] and control"[253] the marginal sea for purposes such as national defense, but in doing so it cannot interfere with the ownership and public trust rights of the coastal states. This is a fine line to walk for the Department of Defense.

Consider a decision by a military commander to periodically close a three-dimensional portion of the air, land, and sea within the marginal sea for military exercises. Assume the commander has no specific congressional authority to take such action. Would that decision run afoul of the Submerged Lands Act? On the one hand, this action is an exercise of the paramount federal power of national defense. On the other hand, military control of the area amounts to "management" and "use" of the lands and natural resources in the marginal sea — activities prohibited by §1314 of the Act.

This hypothetical situation is not unrealistic. Congress has considered such matters in a similar context. Shortly after it passed the Submerged Lands Act, Congress passed the Outer Continental Shelf Lands Act.[254] In this Act, Congress established a federal management scheme for the development of mineral resources seaward of the three-mile limit. In recognition of the importance of the area to national defense, Congress provided for the Secretary of Defense to restrict certain regions from oil and gas exploration and development.[255] No further congressional action is required. The Submerged Lands Act contains no such provision. Despite Congress's unquestionable authority, in light of *United States v. California,* to give the Secretary of Defense similar discretion within the marginal sea, it chose not to do so.

One can argue that the paramount powers doctrine allows the Secretary of Defense similar control of the marginal sea, despite con-

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[252]California *ex rel.* State Lands Comm'n v. United States, 457 U.S. 273, 280 (1982). ***See also*** California ***ex rei.*** State Lands Comm'n v. United States, 805 F.2d 857 (9th Cr. 1986) (unrelated case).

[253]43 U.S.C. § 1314(a) (1988).

[254]*Id.* §§ 1331-1356.

[255]*Id.* § 1341(d). The Secretary of Defense must first obtain the President's approval.

gressional silence. None of the Supreme Court's three offshore oil decisions — California, Louisiana, or Texas — specifies where the determination to invoke the paramount federal powers of national defense must originate. Presumably, the determination can originate in either the executive or legislative branch. Neither do those cases indicate what level of authority is necessary to invoke the federal government's paramount powers. Certainly the Secretary of Defense, a person granted broad discretionary powers and vested with great responsibilities,[256] can make such a determination if the opportunity still exists.

Neither the courts nor Congress, however, would receive this argument favorably. As a practical matter, the Submerged Lands Act has foreclosed this opportunity. By declaring the states owners of the marginal seabed and, in the Supreme Court's eyes,[257] delegating to them broad federal powers to control those lands, Congress has established itself as the only authority legally competent to completely deny a state use of those lands. Absence of a Submerged Lands Act provision similar to the "national defense area" section of the Outer Continental Shelf Lands Act[258] supports this view, as does the narrow analysis that courts use under the preemption doctrine.[259]

Thus military agencies cannot gain control of areas within the marginal sea by simply asserting a superior federal right. Congressional action will be necessary. States, on the other hand, gained power under the Submerged Lands Act. They now have a broad grant of congressional authority to exercise both their public trust and police powers over activities in the marginal sea. Missing from both the Submerged Lands Act and the common law evolution of the public trust doctrine, however, is a clear means to enforce a state's public trust law against the federal government. The Coastal Zone Management Act provides that means.

3. Coastal Zone Management Act — Unlike the Submerged Lands Act, the Coastal Zone Management Act[260] did not arise as a result of a federal-state conflict.[261] Concern over the future of America's coasts increased gradually, gaining momentum through

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[256] 10 U.S.C. § 113 (1988).

[257] United States v. Louisiana, 363 U.S. 1, 86 (1960) (Black, J., concurring and dissenting).

[258] 43 U.S.C. § 1341(d) (1988).

[259] *See infra* text accompanying notes 157-97.

[260] 16 U.S.C. §§ 1451-1464 (1988 & West Supp. 1994).

[261] This does not mean the Act has not generated conflict. President Reagan, for example, refused to fund the Coastal Zone Management Act by making no provision for it in any one of his eight federal budgets. Congress funded the Act nonetheless. 136 CONG. REC. H8070 (daily ed. Sept. 26, 1990).

the years from 1950 to 1969.[262] A federal report, entitled "Our Nation and the Sea,"[263] highlighted the problems of development and resource exploitation. As a solution, it recommended a federal act that would "permit conscious and informed choices among development alternatives and which [would] provide for proper planning."[264] Congress responded with the Coastal Zone Management Act. Although a federal statute, states are the linchpins of its effectiveness. "The states were selected as the key to effective coastal management and protection, while the federal role was to encourage states to exercise their full authority over coastal areas by developing management programs meeting minimum federal standards."[265]

In many ways the Coastal Zone Management Act mirrors state public trust law. It too concerns the wise use of coastal resources. Congress's first finding in the Act states that "[t]here is a national interest in the effective management, beneficial use, protection, and development of the coastal zone."[266] Accordingly, the Act declares a national policy "to preserve, protect, develop, and where possible, to restore or enhance the resources of the Nation's coastal zone for this and succeeding generations."[267] Like the public trust doctrine, the Coastal Zone Management Act is a law that balances competing interests.[268] Among the many interests it recognizes are conservation, recreation, public access, commercial development, fishing, waterfront redevelopment, and national defense.[269] As with the public trust doctrine, its emphasis has shifted over the years. The Act as

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[262] H. REP. NO. 1012, 96th Cong., 2d Sess. 22-23 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4370-71 [hereinafter H. REP. NO. 1012].

[263] A report by the Marine Science, Engineering, and Resources Commission. This is commonly referred to as the "Stratton Report." S. REP. NO. 277, *supra* note 2, at 1772.

[264] *Id.* at 1772-73.

[265] 136 CONG. REC. H8069 (1990).

[266] 16 U.S.C. § 1451(a) (1988 & West Supp. 1994).

[267] *Id.* § 1452(1).

[268] S. REP. No. 753, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4778 [hereinafter S. REP. NO. 7531; H. REP. NO. 1012, *supra* note 262, at 33, *reprinted* in 1980 U.S.C.C.A.N. 4381 ("It is this rational balancing of competing pressures on finite coastal resources which was intended by the 1972 act."). Part of the difficulty in balancing competing uses under the Act is its lack of emphasis. The Act does not clearly afford one coastal use more weight than another. The Act's national defense language highlights this dilemma. Congress first finds, "New and expanding demands for food, energy, minerals, [and] defense needs . . . are creating stress on coastal areas." 16 U.S.C. § 1451(f) (1988 & West Supp. 1994). Then, instead of instituting a means to reduce that demand, Congress declared that state coastal management programs "should at least provide for . . . priority consideration . . . for siting major facilities related to national defense." *Id.* § 1452(2)(D). From this, I can only conclude that the concept behind the Act is to draw competing interests together and allow them to mediate their differences in an organized manner.

[269] 16 U.S.C. § 1452.

amended in 1990 attaches greater weight to "environmental protection values" than it did in the past.[270]

The National Oceanic and Atmospheric Administration (NOAA) administers the Coastal Zone Management Act for the federal government.[271] One of the NOAA's functions is to determine whether states' coastal management programs meet federal standard ~A. state program need not contain regulations of such particularity to render unnecessary the need for case-by-case state decisions about future uses of its coastal zone.[273] Wise management and informed decision making, not predictability, are the hallmarks of the Act. For that reason, a state's program does not have to serve as a large zoning map.[274] In this way, the Coastal Zone Management Act is also like the public trust doctrine — the outcome of its use depends upon the facts of each proposed action.

Each state defines the inland reach of its "coastal zone."[275] The seaward reach is fixed at three miles from the low water mark.[276] By definition, the states' coastal zones must therefore include all of the lands and waters in the littoral United States that are subject to public trust law. There is one exception, however: all federal lands are excluded from the coastal zone.[277]

This does not mean federal agencies can ignore the Coastal Zone Management Act. To the contrary, the Act requires:

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[270]In context, the quote reads:

> In view of the continued growth in coastal population and the accompanying environmental problems, [the Act as amended] . . . provide[s] a greater emphasis on environmental protection values in the administration of the [Coastal Zone Management Act.] This is not to say that [the House] Committee [on Merchant Marine and Fisheries] has abandoned the fundamental balancing character of the . . . [Act]. The statute continues to recognize the need for economic growth. However, [the Act as amended] . . . shifts the balance to emphasize more strongly a priority for maintaining the function of natural systems in the coastal zone.

136 CONG. **REC.** H8070 (daily ed. Sept. 26, 1990). Among the changes Congress made to the Act in 1990, is a requirement for states to develop and implement a "Coastal Nonpoint Pollution Control Program." 16 U.S.C. § 1455b (1988 & West Supp.). This program is aimed at reducing pollution caused by certain land uses, such as pesticide and fertilizer pollution from golf courses, rather than point sources like sewer pipes.

[271]S. REP. NO. 753, ***supra*** note 268, ***reprinted in*** 1972 U.S.C.C.A.N. 4784. ***See also*** Coastal Management Program Development Regulations 15 C.F.R. § 923.2(b) (1993).

[272]Program requirements are found at 16 U.S.C. § 1455(d) (1988 & West Supp. 1994) and 15 C.F.R. § 923.80 (1993). Congress amended the program requirements in 1990. Among the changes was the addition of public participation requirements for consistency determinations. 16 U.S.C. § 1455(d)(14) (1988 & West Supp. 1994).

[273]American Petroleum Inst. v. Knecht, 609 F. 2d 1306, 1312 (9th Cir. 1979).

[274]*Id.* at 1314 n.15.

[275]This term is defined at 16 U.S.C. § 1453(1) (19881.

[276]*Id.*

[277]*Id.*

> [e]ach federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone [] [to] be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.[278]

This section requires what has come to be known as a "consistency determination." Federal agencies must make written determinations of the effects that proposed projects will have upon the coastal zone, and to compare those effects to state management programs. Those projects that are not consistent to the maximum extent practicable cannot proceed. "To the maximum extent practicable" means "fully consistent with . . . [state] programs unless compliance is prohibited . . . [by] law."[279] Disagreements between state and federal agencies over consistency are resolved either voluntarily through mediation by the Secretary of Commerce,[280] or by a federal court.[281] Congress considers the consistency determination to be the "heart" of the Act.[282] Without it, Congress believed states would not participate in the federal scheme.[283]

As originally worded, the Coastal Zone Management Act required federal agencies to formulate consistency determinations only when their activities "directly affect[ed]" the coastal zone.[284] Congress amended the Act in 1990[285] to legislatively overrule a Supreme Court decision that narrowly construed "directly affect" to

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[278] 16 U.S.C. § 1456(c)(1)(A) (1988 & West Supp. 1994).

[279] 15 C.F.R. § 930.32 (1993). Merely finding that a federal management policy is similar to a state's policy is insufficient. Relying on future consistency determinations triggered by further developments in the same federal project, also is insufficient. Conservation Law Foundation v. Watt, 560 F. Supp. 561 (D. Mass. 1983).

[280] 15 C.F.R. pt. 930, subpt. G (1993). *See* Barcelo v. Brown, 478 F. Supp. 646, 681-82 (D.P.R. 1979) *aff'd in part, vacated in part on other grounds*, 643 F.2d 35 (1st Cir. 1981), *rev'd on other grounds sub nom.*, Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) (Act's mediation provisions do not rob court of jurisdiction).

[281] 15 C.F.R. § 930.116 (1993). States have standing to challenge federal consistency determinations. Secretary of Interior v. California, 464 U.S. 312, 319 n.3 (1984). The limited waiver of the federal government's sovereign immunity found in the Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1988), provides the means to obtain relief. State of New York v. DeLyser, 759 F. Supp. 982 (W.D. N.Y. 1991).

[282] "The federal consistency provisions are at the heart of the Nation's coastal zone management program and it has become increasingly clear that the combination of Supreme Court dicta and federal agency belligerence are a troublesome combination." 136 CONG. REC. H8073 (daily ed. Sept. 26, 1990). The case to which this statement refers is Secretary of the Interior v. California, 464 U.S. 312 (1984) (five-to-four decision).

[283] 136 CONG. REC. H8072 (daily ed. Sept. 26, 1990); H. REP. NO. 1012, *supra* note 262, at 35, *reprinted in* 1980 U.S.C.C.A.N. 4383.

[284] Pub. L. No. 92-583, Title III, § 307(c), 86 Stat. 1285 (1972).

[285] Pub. L. No. 101-508, Title VI, § 6208(a), 104 Stat. 1388-307 (1990).

exclude sales of oil leases for areas on the outer continental shelf.[286] The amended version of the Act:

> establishes a generally applicable rule of law that any federal agency activity (regardless of its location) is subject to the [Act's]requirement for consistency if it will affect any natural resources, land uses, or water uses in the coastal zone. No federal agency activities are categorically exempt from this requirement.[287]

Federal agencies will be hard pressed now to convince the Secretary of Commerce or a court that their activities in the littoral areas of the United States do not require consistency determinations.[288]

Like the Submerged Lands Act, the Coastal Zone Management Act has an exemption to the consistency determination requirement for those activities "in the paramount interest of the United States."[289] Unlike the Submerged Lands Act exemption, however, the consistency determination exemption contains explicit procedural steps.[290] Lack of funds to make the activity consistent is not grounds for a waiver.[291] The onerous nature and political visibility of the exemption procedures make it unlikely that any federal agency will make use of the provision.[292]

As stated previously, the Coastal Zone Management Act protects public interests in coastal lands in much the same manner as the public trust doctrine. In order to accomplish these broad protective goals, the statute acts in conjunction with other federal land use

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[286]Secretary of Interior v. California, 464 U.S. 312 (1984).

[287]136 CONG. REC. H8076 (1990).

[288]Congress was resolute in its decision to amend the Act in 1990. The bill passed in the House by a vote of 391 to 32, with 9 members abstaining or absent. 136 CONG. REC. H8103 (daily ed. Sept. 26, 1990).

[289]16 U.S.C. § 1456(c)(1)(B).

[290]To obtain a waiver under the exemption provision, 16 U.S.C. § 1456(c)(1)(B), a federal agency has to do the following: (1) obtain a judicial decree that the federal activity is inconsistent with the state coastal management program; (2) obtain a determination from the Secretary of Commerce that formal mediation will not resolve the inconsistency; (3) convince the Secretary of Commerce to write a letter to the President asking for a waiver; and (4) convince the President that the waiver is in the paramount interests of the United States.

[291]*Id.*

[292]Congress requires the Secretary of Commerce to biennially report all "federal activities and projects which . . . are not consistent with an applicable approved state management program." 16 U.S.C. § 1462(a) (1988 & West Supp. 1994). Because a secretarial finding of inconsistency is a prerequisite to a presidential exemption, Department of Defense officials will undoubtedly be reluctant to apply for exemptions. Congress will take note of each one.

and environmental laws.[293] It does not repeal them.[294] Nor does the Act preempt state law.[295] To the contrary, Congress expects states to incorporate their land use and environmental laws into their coastal management programs.[296]

One body of state law that can be incorporated into a state's coastal management program is its public trust law.[297] If a state takes this step, it can regulate federal activities in the coastal zone in a manner that enhances the public trust. Two means of regulation are possible: (1) indirectly, through a consistency determination by the federal agency; and (2) directly, by way of a permit.[298] In either case, federal agencies will have to comply with state public trust law in the nation's coastal areas.

***4. Public** Trust Doctrine Still a Meaningful Legal* Tool—Since the enactment of the Submerged Lands Act and the Coastal Zone Management Act, one might question the usefulness of the public trust doctrine as a legal tool. It would appear that the purposes and interests protected by the doctrine are subsumed in those laws. To some degree this is true. The Coastal Zone Management Act requires states to balance public interests in much the same manner

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[293] *E.g.*, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988 & West 1994), the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988 & West 1994), and the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988). Plaintiffs often challenge federal actions in the coastal zone under these and other statutes, including the Coastal Zone Management Act. ***See,*** *e.g.*, Conservation Law Foundation v. Watt, 560 F. Supp. 561 (D. Mass. 1983); Romero-Barcelo v. Brown, 643 F.2d 835 (1st Cir. 1981) *reversed on other grounds sub nom.*, Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

[294] 136 CONG. REC. H8077 (1990).

[295] S. REP. NO. 753, ***supra*** note 268, *reprinted* ***in*** 1972 U.S.C.C.A.N. 4776.

[296] 16 U.S.C. § 1455(d)(2)(D) (1988 & West 1994).

[297] The authors of PUBLIC **TRUST** DOCTRINE, *supra* note 10, ch. 7, recommend that states do this as the best way to ensure that federal activities do not run afoul of their public trust laws.

[298] The Coastal Zone Management Act does not preempt state law regarding environmental permits. California Coastal Comm'n v. Granite Rock, 480 **U.S.** 572 (1987). The United States Court of Appeals for the Ninth Circuit (Ninth Circuit) required the Navy to obtain a permit from the State of Washington under its coastal management statute in Friends of the Earth v. United States Navy, 841 U.S. 927 (9th Cir. 1988). Absent from both cases is a discussion of sovereign immunity. *Granite* ***Rock*** dealt with a private corporation seeking a license to mine in a national forest so sovereign immunity was not an issue. In *Friends of the Earth*, the Ninth Circuit found an express congressional mandate in the National Defense Authorization Act for the Navy to obtain state permits prior to obligating funds for construction of a homeport facility.

As an alternative basis for its holding, the Ninth Circuit found that the Navy needed a permit under Washington's coastal management statute. It used the *Granite* Rock rationale that a state permit that seeks only to ensure protection of the environment and does not attempt to determine appropriate uses of federal lands is not preempted by the Coastal Zone Management Act. This is an unsound extension of the

as does the public trust doctrine. The Submerged Lands Act limits military authority in the marginal sea.

Yet a closer inspection of the public trust doctrine reveals its continued usefulness. Foremost among its attributes is its flexibility. As a common law creation, it is capable of change in both scope and purpose to meet society's changmg values.[299] Statutes, on the other hand, have fixed purposes and meanings. While they too can change, legislative solutions to problems apply only prospectively. Moreover, a court can fashion a remedy directly using the public trust doctrine; the legislative process is slower because more people take part in the deliberations.

Public trust law, although not an ownership right, is a property-based doctrine. It may succeed in securing state control over a resource where a state's police powers might fail. Based on a duty to preserve the trust corpus for its citizens, the doctrine allows states to prohibit activities that harm or devalue the corpus. So long as those prohibitions do not discriminate against nonresidents they are constitutional.300

Granite Rock holding. In any case where a state or local government attempts to require a federal agency to obtain a permit, the appropriate issue is whether Congress has waived the sovereign immunity of the United States ***See*** Hancock v. Train, **426** U.S. 167 (1976). Absent a clear expression of congressional intent to waive sovereign immunity, no inferior government can place requirements on the federal government. *Id.* Because the Coastal Zone Management Act does not contain a waiver of sovereign immunity, a permit requirement under state law should not apply to federal agencies.

The issue is different when the state leases or licenses its land to the federal government. In that situation, the state may place the very same provisions that it would have placed in a permit in the lease or license agreement. ***See*** PUBLIC TRUST DOCTRINE, ***supra*** note 10, at 241-44.

[299]Thus, when incorporated into a state's coastal management program under the Coastal Zone Management Act, the public trust doctrine provides flexibility even in a statutory system. Of course, flexibility can mean unpredictability; a reason why the public trust doctrine can be problematic for the military.

[300]In Toomer v. Witsell, **334** U.S. **385** (1948), the Court invalidated a South Carolina statute that taxed nonresident shrimp fishermen at a higher rate than residents. Its decision rested on the Privileges and Immunities Clause. U.S. CONST. art. IV, § **2.** The Court distinguished, but did not overrule, McCready v. Virginia, **94** U.S. **391** (1876), because it held that states could prohibit nonresidents from planting oysters in the Ware River for later harvest based on state ownership of the river bed. ***As*** United States v. California, **332** U.S. **19 (1947)** declared that no one owned the marginal sea, and ***Toomer*** dealt with shrimp fishing in those waters, the Court reasoned that *McCready* no longer applied. Of course, the Submerged Lands Act vested the states with ownership of the resources in the marginal sea. Accordingly, the majority opinion in ***Toomer*** is now obsolete.

Justice Frankfurter's concurring opinion in ***Toomer*** is better reasoned. He would have invalidated South Carolina's statute based on the negative Commerce Clause doctrine. He believed that the Privileges and Immunities Clause had to be read in light of existing law at the time the Framers drafted the Constitution. As the public trust doctrine was "one of the weightiest doctrines in our law" in 1787, there

Public trust law imposes a duty on states to continually supervise the trust corpus.[301] Laches does not bar the application of that duty.[302] Citizens have standing to challenge state decisions involving the public trust[303] whereas, under the Coastal Zone Management Act, only affected parties can challenge state and federal decisions.[304] Federal agencies need to take heed of these aspects of the public trust doctrine. They allow state agencies to be aggressive in their actions to preserve coastal resources and enhance the vigilance of concerned citizens.

Finally, military planners should be aware that Congress wants states to acquire more lands to ensure greater public access to coastal resources.[305] Through the Coastal Zone Management Act, Congress provides funds for states to acquire lands.[306] Recall that private lands within the trust corpus are burdened by the state's dominant *jus publicum* interest.[307] As America's coastal areas become more densely populated, states may be more inclined to exercise this dominant interest.[308] This may serve simply to limit the discourse over military use of coastal training areas to state and federal agencies. It could also serve to further restrict military activ-

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was no justification for the opinion that the Privileges and Immunities Clause was designed to thwart state preservation of its resources for its citizens. *Toomer*, 334 U.S. at 408. *See also* Smith v. Maryland, 59 U.S. (18 How.) 71 (1855). In the Submerged Lands Act, Congress recognized state control over the taking of natural resources. *See* 43 U.S.C. § 1311(a) (1988); S. REP. NO. 133, 83d Cong., 1st Sess., (1953), *reprinted in* 1953 U.S.C.C.A.N. 1479 [hereinafter S. REP. NO. 1331.

[301] *See generally* PUBLIC TRUST DOCTRINE, *supra* note 10, ch. VI.

[302] Weber v. Board of Comm'rs, 85 U.S. (18 Wall.) 57 (1873). North Carolina amended its laws in 1985 to preclude an adverse possession defense against actions involving public trust lands. Daniel F. McLawhorn, *The Public Trust in Submerged Lands*, POPULAR GOV., Spring 1986, at 9.

[303] *See supra* text accompanying notes 149-52.

[304] The Coastal Zone Management Act "is neither a jurisdictional grant nor a basis for stating a claim upon which relief can be granted." Town of Hempstead v. Village of North Hills, 482 F. Supp. 900, 905 (E.D. N.Y. 1979). In Friends of the Earth v. Navy, 841 F.2d 927 (9th Cir. 1988), the Ninth Circuit found that the plaintiffs had standing under the Administrative Procedures Act to challenge the Navy's compliance with the 1987 National Defense Authorization Act. The Ninth Circuit did not conduct a detailed analysis of the standing issue regarding the Coastal Zone Management Act.

[305] 136 CONG. REC. H8071-72 (1990); S. REP. No. 753, *supra* note 268, *reprinted in* 1972 U.S.C.C.A.N. 4787.

[306] 16 U.S.C. §§ 1455a(b)(3), 1456b(a)(3) (1988); 136 CONG. REC. H8071-72 (daily ed. Sept. 26, 1990).

[307] *See supra* text accompanying notes 64-79.

[308] The power of the public trust doctrine to prevent successful claims of regulatory takings of private property is a recurrent theme in virtually all public trust literature. *See, e.g.*, PUBIC TRUST DOCTRINE, *supra* note 15. But the doctrine is not a guarantee of success. *See* Nollan v. California Coastal Commission, 483 U.S. 825 (1986) (state cannot hinge a building permit upon a condition that the applicant grant an easement across a dry sand beach—nonpublic trust property—to facilitate public access to the shore).

ity because of a public demand for peace and solitude in pristine places.[309]

IV. Application of the Public Trust Doctrine to Military Activities

As will be seen, there are many ways in which state public trust law might apply to military activities in the littoral United States. Fundamental to any legal challenge of that application are the concepts of sovereign immunity and federal preemption. Courts narrowly construe both concepts, producing a result unique to our federal system: federal and state laws usually coexist, but the federal government's compliance with them can rarely be challenged with success.

For this discussion, imagine three situations. In the first, a state legislature passes a law that declares military training to be incompatible with preservation of its public trust values—a flat out ban on military training. In the second, the state takes a less hostile approach. State administrative agencies attempt to use state public trust law to regulate the manner in which the Department of Defense utilizes state public trust resources. The third situation involves a citizen suit to challenge a state agency's decision to license public trust lands to the Department of Defense.

A. *Ban on Military Training*

Scenario: *Disturbed over an apparent reluctance by the military to truly embrace its coastal preservation policies, a coastal state with significant amphibious training facilities (North Carolina, California, or Hawaii, for example) decides to prohibit military training in its coastal region. The state legislature passes a bill which the governor signs effecting this decision. Among the legal bases put forth by the legislature as supportive of its decision is the state's public trust law. Rather than wait for a political response, which the Department of Defense fears will produce a compromise that further erodes military training flexibility, the United States brings suit to declare the state law invalid.*

A state's decision to prohibit military training in areas protect-

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[309] Compatibility of military training with preservation and enjoyment of natural resources remains an unsettled issue. Aircraft noise is a significant factor. ***See,*** *e.g.*, 16 U.S.C.A. § 1, note (Department of Interior required to study effect of aircraft overflights in the Grand Canyon); S. 21, 103d Cong., 1st Sess., Title VIII (Desert Protection Act) (military overflights compatible with designation of lands as wilderness areas); Branning v. United States, **654** F.2d 88 (Ct. Cl. 1981) (Marine aircraft conducting simulated aircraft carrier landings in the sky above plaintiff's property resulted in an unconstitutional taking of property).

ed by its public trust law may never come about for political reasons.[310] From a purely legal standpoint, however, it is easy to see how a state could find such incompatibility. Military training restricts access to public trust resources, a restriction that affects both commercial and noncommercial use of the trust corpus. Navy ships discharge wastes into coastal waters. Army and Navy landing craft and Marine Corps amphibious tractors disturb the seabed and beaches. Live-fire exercises in coastal waters result in millions of spent rounds of ammunition building up on the ocean floor. Military aviators drop ironclad, concrete-filled practice bombs that also settle on the seabed. Finally, military training is a noisy activity. The noise may conflict with the public trust doctrine's preservation of recreational and aesthetic values.[311]

*1. **Preemption** of **State** Law*—Any federal government challenge to a state ban would rest solidly on preemption. Federal law is the supreme law of the land and, in any case where the federal law and state law cannot coexist, the federal law prevails.[312] Key to this issue would be congressional intent and actual conflict between the laws. The purpose behind the state law or the validity of its assertions would become irrelevant.[313]

Preemption can occur in three ways.[314] "Congress can define explicitly the extent to which its enactments preempt state law."[315]

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[310]Gone are the days, if they ever existed, when military leaders could rely on their federal status and ignore the states. Military leaders now identify and track state concerns. A military-state dispute over coastal resources is unlikely to reach the proportions where a state resorts to the action I suggest here. If truly at loggerheads with the military, state officials would probably seek congressional assistance. Indeed, history demonstrates the way in which disputes over public trust resources move amoeba-like among the three branches of government. ***See, e.g.,*** United States v. California, **332 U.S. 19 (1947);** Illinois Cent. R.R. v. Illinois, **146** U.S. **387 (1892);** West Indian Co. v. Government of the Virgin Islands, **844** F.2d **1007** (3d Cir. **1988);** **BAILEY,** ***supra*** note **2.**

[311]These types of activities were the bases of the plaintiffs' challenge in Barcelo v. Brown, **478** F. Supp. **646** (D.P.R. **1979), *aff'd in part and vacated in part on other grounds,* 643** F.2d **35** (1st Cir. **1981), *rev'd on other grounds sub nom.,*** Weinberger v. Romero-Barcelo, **456** U.S. **305 (1982).**

[312]U.S. CONST. art. VI, cl. 2; McCulloch v. Maryland, **17** U.S. **(4** Wheat.) **316 (1819).**

[313]In the Commerce Clause context, Chief Justice Marshall made this clear in Gibbons v. Ogden, **22** US. **(9** Wheat.) **1, 10 (1824)** where he wrote:

> [s]hould this collision [between state and federal law] exist, it will be immaterial, whether those [state] laws were passed in virtue of a concurrent power "to regulate commerce among foreign nations and the several states," or, in virtue of a domestic power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress.

[314]This analysis comes from English v. General Electric Co., **496** U.S. **72 (1990)** unless otherwise noted.

[315]*Id.* at **78.**

This occurs so infrequently that some courts decide to omit this step in their analysis.[316] Despite the near certainty that Congress has never intended to allow a state to use its environmental and land use laws to entirely proscribe military training, evidence of that intent is nonexistent. There is no language in federal environmental or land use statutes[317] or the National Defense Authorization Acts,[318] that manifests such intent. This can be expected in a political system based upon the premise that the federal government's power ultimately flows from power delegated by the states.[319]

The second way in which a court can find preemption is to ascertain that "state law . . . regulates conduct in a field that Congress intended the Federal Government to occupy exclusively."[320] For evidence of this intent, courts look to pervasive federal regulations that do not leave room for state regulation, or a field of activity in "which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[321] If the field of activity in this case is national defense, the analysis ends here: states have no role in the security of this nation.[322]

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[316]Beveridge v. Lewis, 939 F.2d 859, 862 n.1 (9th Cir. 1991).

[317]To the contrary, the three most dominant federal environmental statutes have provisions that require federal agencies to comply with state environmental laws and regulations as any other person must do. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, 1323 (1988); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6991i, as amended *by* The Federal Facilities Compliance Act, Pub. L. 102-386, 42 U.S.C. § 6961 (West Supp. 1993); Clean Air Act, 42 U.S.C. §§ 7401-7671q, 7418 (1988 & West Supp. 1994). Federal land use statutes do not waive sovereign immunity, but require federal agencies to consider state laws, regulations, and policies in their land management decisions. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988), as implemented by Council on Environmental Quality Regulations, 40 C.F.R. §§ 1501-1508 (1993); Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464, 1456 (1988 & West Supp. 1994); Endangered Species Act, 16 U.S.C. §§ 1531-1544, 1536 (1988 & West Supp. 1994).

[318]These statutes generally have very broad language that express no evidence of congressional intent to preempt state law to allow for unimpeded military training. For example, "[T]he Secretary of the Navy may acquire real property for the installations and locations inside the United States . . . ." 1992 National Defense Authorization Act, § 2201, Pub. L. 102-484, 106 Stat. 2315 (1992). Even when Congress authorizes military agencies to acquire specific parcels of property, it says nothing to indicate preemption. See *id.* §§ 2831-2848. Congress has gone in the opposite direction and required defense agencies to comply with otherwise inapplicable state environmental laws. *See, e.g.*, 1987 National Defense Authorization Act, § 2207 Pub. L. 99-661, 100 Stat. 3816 (1986) (funds for construction of naval home port facility in Everette, Washington, conditioned on obtaining state environmental permits). This law is the subject of Friends of the Earth v. Navy, 841 F.2d 927 (9th Cir. 1988).

[319]*See, e.g.*, Pollard's Lessee v. Hagan, 4 (3 How.) 212 (1845).

[320]English v. General Electric Co., 496 U.S. 72, 79 (1990).

[321]*Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). *See* United States v. Curtis-Wright, 299 U.S. 304 (1936); United States v. California, 332 U.S. 19 (1947).

[322]*See Curtis-Wright*, 299 U.S. at 304; United States v. California, 322 U.S. at 19.

To counter the federal argument that the state law is an attempt to regulate military activity, the state would assert that its law does not entirely prohibit military activity within its borders. Instead, the state would characterize its ban as a land use and environmental law that furthers both state and national coastal preservation interests. Attorneys for the state could buttress their position by pointing to the Submerged Lands Act's cession of federal authority to manage natural resources in the marginal sea and the Coastal Zone Management Act's scheme of state management.

At the end of the second part of the preemption analysis there may be preemption depending on how a court analyzes the state law: if it implicates national security, it will be preempted; if it is viewed as an environmental or land use measure, then it may coexist with federal law.

Fortunately, the third prong of the preemption test yields a definite answer. It mandates preemption when either: (1) it is impossible to comply with both state and federal requirements, or (2) state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[323] A state ban on military training in its coastal region would run afoul of both (1) and (2). It is inconceivable that Congress would appropriate money to construct and operate training ranges and military installations in the coastal region of a state and then acquiesce to that state's veto of military activity.

California's reluctance to embrace federal nuclear power programs provides some illumination on the question of flat-ban preemption. Following a finding by the federal Nuclear Regulatory Commission that nuclear powerplants did not pose a safety concern, California's legislature passed a statute that forbade siting of nuclear energy facilities in the state unless adequate storage and disposal facilities were available for nuclear waste. Arriving before the Supreme Court as *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission,*[324] the case hinged on preemption. After noting the "traditional role" of states in "electricity production," the Court found that the state law was not preempted by federal laws or regulations.[325] Like the question of whether the state's ban of military activities in the coastal region is grounded in national security or land use and environmental law, this case presented the question of whether California's law con-

[323] *English*, 496 U.S. at 79 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[324] 461 U.S. 190 (1983).

[325] *Id.* at 194.

cerned nuclear safety or the economics of waste storage and disposal. The Court accepted California's position that the law dealt with economics. Had it been otherwise, California's law would not have survived:

> A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field. Moreover, a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the N[uclear] R[egulatory] C[ommission] . . . that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal. A state prohibition on nuclear construction for safety reasons would also be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use—and would be pre-empted for that reason.[326]

A state prohibition on military training based on a state's public trust law would fare the same. Such a prohibition would directly conflict with both congressional plans for military training and determinations of military officials concerning the manner in which America's armed forces should train.[327]

2. A Negative War Powers Theory—Although there is little room for doubt about the efficacy of a federal preemption argument in this scenario, another reason may exist to negate the state's law. This is a negative War Powers theory, similar to the Supreme Court's negative Commerce Clause theory as set out in ***Pike v. Brice Church, Inc.***[328] Negative Commerce Clause theory allows for some state regulation of commerce, but states cannot tread too roughly upon Congress's role in that field. The purpose of the theory is to prevent states from enacting laws that splinter the nation by restricting the flow of goods in commerce.[329] A similar purpose

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[326] *Id.* at **213.**

[327] Courts have long been reluctant to delve into questions of military training requirements. ***See, e.g.***, Rostker v. Goldberg, **453 U.S** 57 (1981).

[328] **397 U.S.** 137 (1970).

[329] In H.P. Hood & Sons, Inc. v. Du Mond, 336 **U.S.** 525, 534-35 (1949), the Supreme Court articulated the purpose of the negative Commerce Clause theory as follows:

> The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more that by interpretation of its written word, this Court has advanced the solidarity of this Nation by the meaning it has given to these great silences of the Constitution.

would underlie a negative War Powers theory: to prevent states from interfering with the security of the nation.

Courts utilize negative Commerce Clause theory in cases where Congress has not spoken to affirmatively exclude state regulation in a particular area. It would thus be appropriate to apply a negative War Powers analysis here, where Congress has spoken only vaguely about military training requirements.

To determine whether the state's application of its public trust law in this scenario violates the negative aspects of the War Powers clauses, it is only necessary to rephrase the test used by Justice Stewart in *Pike:*

> Where the [state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce [national security] are only incidental, it will be upheld unless the burden imposed on such commerce [security] is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree.[330]

A negative War Powers theory would be less tolerant of state law than the negative Commerce Clause theory because states have no role in national defense. Under the *Pike* analysis, then, the state's public trust interest would be legitimate, but there would be no room for the state law in the realm of national security. The effect of the state law upon national security would be direct, not incidental.[331] Accordingly, the state's law would fail.

B. State Regulation of Military Activities

Scenario: *For various reasons, political, economic, and otherwise, state officials do not want to directly oppose military training in*

(quoted with approval in Hughes v. Oklahoma, **441 U.S. 322,326 n.2 (1979)**).

[330] Pike v. Brice Church, Inc., **397 U.S. 137, 142 (1970)** (citation omitted).

[331] Congress could create state veto power over certain military projects and thus remove from the judiciary the question of whether the state's law interferes with the federal government's war powers. This has occurred in both a Commerce Clause context (Illinois Cent. R.R. v. Illinois, **146 U.S. 387, 439-40 (1892)** where Congress required Illinois to obtain Chicago's consent to a railroad before the state could acquire federal monies) and a national security context (Romero-Barcelo v. Brown, **643 F.2d 843-846,** *rev'd* OR *other grounds sub* ***nom.,*** Weinberger v. Romero-Barcelo, **456 U.S.305 (1982)** where Congress required the Navy to conclude an agreement with Puerto Rico before relocating training facilities)). Without a congressional waiver, however, states must bear in mind the limits of their authority. "The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred." Sporhase v. Nebraska, **458** US. **941, 959-60 (1981).** This must be true with respect to the negative aspects of congressional War Powers authority as well.

coastal regions. Nevertheless, they have an obligation and desire to lessen the impact of military activities on their coastal resources. To do so, state officials determine to exercise the public trust doctrine to its fullest extent. First, they view military training from the standpoint of regulatable activities, such as hazardous waste generation and water pollution. Next, they examine the laws that allow the state either to regulate the military directly, or to influence the way in which other federal agencies regulate military activities. Finally, they incorporate their public trust values into both their laws and their strategies to influence federal regulatory agencies.

Commentators who seek to expand the use of the public trust doctrine recognize the difficulty of state control of federal activities: sovereign immunity. State laws do not apply to the federal government itself unless Congress "clear[ly] and unambiguous[ly]" waives sovereign immunity.[332] To overcome this difficulty, commentators recommend incorporating state public trust laws into those statutes that do apply to the federal government.[333] Contrary to the previous scenario, preemption is not an issue: Congress expects federal agencies to comply with state environmental and land use laws.[334] The key in this instance is to identify those legal options that allow state regulation of military activities. There are several.[335]

1. Coastal Zone Management Act — Foremost among these alternatives is the Coastal Zone Management Act. Through the consistency determination process states can force military commanders to apply state public trust law to military activities that affect the coastal zone. State coastal management programs may also have permit requirements for coastal zone activities. In cases where military agencies have to obtain permits, states can impose permit conditions that uphold public trust values. California and Washington, for example, have coastal activity permit requirements.[336] North

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[332]Hancock v. Train, 426 U.S. 167, 180 (1976).

[333]*See* **PUBLIC TRUST** DOCTRINE, ***supra*** note 10, ch. X.

[334]***See supra*** note ***223*** and accompanying text.

[335]In the sections that follow, I present ways in which states may apply their public trust laws to military activities. The list is not exhaustive. My analysis is purposely shallow. My goal is simply to alert military attorneys to the possible challenges public trust laws may pose to their services' missions.

In an effort to add some specificity to an article that is long on generalities, I will use North Carolina and California laws as examples. Those states are homes to the Marine Corps' largest installations.

[336]California Coastal Comm'n v. Granite Rock, 480 U.S. 572, 580 (1987); Friends of the Earth v. Navy, 841 F.2d 927 (9th Cir. 1988).

Carolina has a permit requirement for its areas of environmental concern,[337] but exempts "federal agency development activities."[338]

State constitutions, statutes, and regulations also contain public trust language. North Carolina's constitution evinces public trust values:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State . . . to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.[339]

California's constitution explicitly restricts alienation of tideland and provides for freedom of navigation through and public access to navigable waters.[341] Its "[l]egislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."[342]

Public trust law, as applied through state coastal management programs and other vehicles, is not directorial in nature. Its effect is more subtle. Statutes infused with public trust values foreclose opportunities, restrict choices, and tip the scale toward maintaining the status quo. In California, conflicts among the policies in its coastal management program are to "be resolved in a manner which on balance is the most protective of significant coastal resources."[343] Both California and North Carolina favor acquisition and maintenance of public ways to beaches over coastal development.[344] Projects in North Carolina that "significantly interfere with the public right of navigation or other public trust rights . . . shall not be allowed" unless they have "an overriding public benefit."[345]

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[337] N.C. ADMIN. CODE T15A: 07H 0102(e) (Apr. 1990)

[338] N.C. ADMIN. CODE, T15A: 07K 0402 (1993).

[339] N.C. CONST. art. XIV, § 5 (1993).

[340] CAL. CONST. art. 10, § 3.

[341] *Id.*

[342] *Id.* § 4.

[343] CAL. PUB. RES. CODE § 30007 5.

[344] N.C. GEN. STAT §§ 113A-134.1 through 134 10, CAL PUB RES CODE §§ 30210-30214, 30530-30534, 31400-31405

[345] N.C ADMIN. CODE § T15A: 07H.0207 (Jan. 1993)

Suppose a military department wanted to establish a multiple-use training area in a state's public trust waters that would provide for bombing and gunnery ranges and amphibious landing sites. What effect would a state's coastal management program—suitably enhanced by the incorporation of its public trust law—have on that desire?

State scrutiny of such a project would be intense. Despite the language in the Coastal Zone Management Act that requires states to give "priority consideration . . . for siting major facilities related to national defense,"[346] neither California's nor North Carolina's coastal management statutes mention the siting of defense facilities or training areas. In fact, California even puts the United States on notice that exclusion of federal lands from the definition of the coastal zone will not inhibit state action. "California shall, consistent with applicable federal and state laws, continue to exercise the full range of powers, rights, and privileges it now possesses or which may be granted [over federal lands]."[347]

In its consistency determination, the military department would have to consider a host of state policies. California has an exception to its policy of public access for national security needs.[348] But the military department could not overlook other public trust values, including: recreation;[349] preservation of marine resources;[350] pollution control;[351] commercial and recreational fishing;[352] and aquaculture.[353] North Carolina has policy guidelines for erosion, public access, mitigation, water quality, coastal airspace use, and "[w]ater and [w]etland [b]ased [t]arget [a]reas for [m]ilitary [t]raining [a]ctivities."[354] The latter policy reads:

> The use of water and wetland-based target areas for military training purposes may result in adverse impacts on coastal resources and on the exercise of public trust rights. The public interest requires that, to the maximum extent practicable, use of such targets not infringe on public trust rights, cause damage to public trust resources, violate existing water quality standards or result in public safety hazards.[355]

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[346] 16 **U.S.C** § 1452(2)(D) (1988 & West Supp. 1994).
[347] CAL. PUB. RES. **CODE** § 30008 (1986 & 1994 Supp.).
[348] *Id.* § 30212.
[349] *Id.* § 30220.
[350] *Id.* § 30230.
[351] *Id.* § 30231.
[352] *Id.* § 30234.5.
[353] *Id.* § 30222.5.
[354] N.C. ADMIN. CODE T15A: 07M.0200 *to* .1000 (Feb. 1990)
[355] *Id.* T15A: 07M.0100.

Terms in this policy, such as "public trust rights" and "damage to public trust resources," are sufficiently vague to allow state officials to find virtually any military live-fire training inconsistent with the state's coastal management program.

In a state with a pertinent permit program, the military department would have to be ready to negotiate permit conditions. These conditions would likely impose time, place, and manner restrictions on military training that would further the state's public trust values.

Although these policies and requirements are significant, military officials should not be daunted by them. They, not the states, make the consistency determinations. In so doing, they can point to federal policies that already account for some of the state concerns. For example, military restrictions on navigable waters cannot "unreasonably . . . interfere" with commercial fishing.[356] Military installation commanders must manage their lands to provide for multiple uses and public access.[357] Military officials can even point to a judicial determination that military training areas enhance rather than destroy living natural resources.[358] In North Carolina, military officials should strive to convince the state that military training is of "overriding public benefit."[359]

2. Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—Military agencies have to respond to releases of hazardous substances in the same manner as private entities.[360] When evaluating remedial alternatives for these releases, military agencies must develop "applicable, or rele-

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[356] 33 U.S.C. § 3 (1988). See the regulations for Navy and Marine Corps training areas, 33 C.F.R. §§ 334.410-440 (1993).

[357] 16 U.S.C. § 670a-1 (West Supp. 1993). Multiple land use and public access requirements became a part of the Sikes Act, 16 U.S.C. § 670 in a 1986 amendment. The amendment's sponsor justified its enactment with these words:

> No one disputes that the military mission must be of paramount importance [on] these reservations, however, the lands are held as a public trust and should be managed on a multiple use basis when compatible with military purposes. Public access appropriate and necessary for those multiple uses is also provided [in the amendment], to the extent that such access is consistent with the military mission of the reservation.

Remarks of Mr. Chafee, 99 CONG. REC. 28617 (daily ed. Oct. 3, 1986).

[358] Barcelo v. Brown, 478 F. Supp. 646, 682-87 (D.P.R. 1979) *aff'd in part and vacated in part on other grounds*, 643 F.2d 35 (1st Cir. 1981), *rev'd on other grounds sub nom.*, Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

[359] *See supra* note 352.

[360] 42 U.S.C. §§ 9601-9675, 9620 (1988 & West Supp. 1993). The CERCLA applies to the Department of Defense through the Defense Environmental Restoration Program, 10 U.S.C. §§ 2701-2708 (1988 & West Supp. 1993).

vant and appropriate requirements" (ARARS).[361] These are the laws that drive the manner and level of remedial activity. They answer the question, "How clean is clean?" States assist in selecting ARARS,[362] and may seek to make their public trust law a factor in the way military agencies clean up hazardous releases.[363]

In addition to hazardous substance responses, the Department of Defense has specific CERCLA responsibilities for offshore oil spills caused by its vessels or released from its facilities.[364] In the case of either an oil or a hazardous substance release, public trustees for natural resources must be notified.[365] In the marginal sea, the adjacent state would be the trustee.[366] Trustees can seek an administrative order, injunctive relief, or a commitment to remove the release.[367]

One of the most attractive remedial actions is to impose institutional and land use controls upon the release site, and then monitor it to ensure the contamination does not migrate. This means the Department of Defense would agree to use the release site in a manner that lessens the risk to human health (e.g., a bombing range vice

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[361] 40 C.F.R. § 300.430(d)(3) (1993).

[362] *Id.* § 300.515(d).

[363] Applicable or relevant and appropriate requirements flow from 42 U.S.C. § 9621. The Environmental Protection Agency (EPA) defines ARARS in the following way:

> ***Applicable*** *requirements* mean those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that specifically address a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site.
>
> *Relevant and appropriate requirements* mean those cleanup standards, standards of control, and other substantive requirements, criteria, or limitations promulgated under federal environmental or state environmental or facility siting laws that, while not "applicable" to a hazardous substance, pollutant, contaminant, remedial action, location, or other circumstance at a CERCLA site, address problems or situations sufficiently similar to those encountered at the CERCLA site that their use is well suited to a particular site.

40 C.F.R. § 300.5 (1993).

State public trust law would specifically address a location if the release occurred within the trust corpus; it would be an "applicable requirement." If the release occurred near, but outside the trust corpus, public trust law might still be a "relevant and appropriate requirement."

[364] National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300.175(b)(4) (1993).

[365] *Id.* §§ 300.135(j), 300.430(b)(7). *See* ***id.*** subpt. ***G*** (discussion of natural resources trustees).

[366] *Id.* § 300.605. One could argue that the United States is trustee for those parts of the marginal sea that it controls during military training. *See* ***id.*** § 300.600(a)(2). But without affirmative congressional action, the Submerged Lands Act would seem to place the resources under state control. ***See*** *supra* text accompanying notes 230-59.

[367] 40 C.F.R. § 300.615(e) (1993).

a school) and to place restrictions in the deed should it ever sell the property. Obviously these actions are far cheaper than removing the contamination and disposing of it as hazardous waste. The EPA expects responsible parties to consider institutional and land use controls as a possible remedial action.[368]

Protection of public trust interests, such as wildlife preservation and public access, may foreclose institutional and land use controls as remedial options. As a result, military agencies might be forced to adopt more expensive alternatives to clean up hazardous releases.[369] State agencies pursuing their trustee obligations could drive up the costs still further by bringing actions to compel military agencies to not only remove the contamination, but to restore the natural resources.[370]

3. Resource Conservation and Recovery ***Act*** *(RCRA)*—Military agencies must manage hazardous wastes they generate in accordance with the RCRA.[371] The Act has strictures governing the storage, treatment, and disposal of hazardous waste. It also imposes permanent joint and several liability upon waste generators for any harm to human health and the environment caused by the release of hazardous wastes. Although the EPA has overall responsibility to implement the RCRA, states can obtain RCRA authority from the EPA.[372] That authority allows states to inspect hazardous waste facilities and to issue permits to control the operation of those facilities. A state's RCRA authority extends to regulation of federal agencies, including the Department of Defense.

Congress amended the RCRA through the Federal Facilities Compliance Act (FFCA).[373] Among other things, the FFCA waived federal sovereign immunity with respect to procedural and substantive requirements of state hazardous waste laws. States can now enjoin federal agency hazardous waste operations, issue administrative orders regarding those operations, and impose fees, fines, and penalties against federal agencies for noncompliance.[374] These

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[368]*Id.* § 300.430(a)(1)(iii)(D).

[369]At an EPA-controlled CERCLA site, the EPA can disregard the state's recommendations when it selects the final remedy. *Id.* § 300.515(d)(3). If a state feels strongly enough about its position, it can challenge the federal decision in court. 42 U.S.C. § 9659 (West Supp. 1993).

[370]40 C.F.R. § 300.615(c)(4) (1993).

[371]42 U.S.C. §§ 6901-6961q (1988 & West Supp. 1993).

[372]*Id.* § 6926.

[373]Pub. L. No. 102-386, 106 Stat. 1505 (1992) [hereinafter FFCA].

[374]Id. § 102(a); 42 U.S.C. § 6961(a) (West Supp. 1993).

enforcement options reinforce existing citizen suit provisions. Citizens can sue for noncompliance with the RCRA's requirements, and affected persons can sue to enjoin and force parties to clean up hazardous waste practices that "may present an imminent and substantial endangerment to health or the environment."[375]

A question that remains unanswered by either the RCRA or the FFCA is whether munitions constitute hazardous wastes.[376] Congress is sensitive to this issue. It directed the Administrator of the EPA to confer with the Secretary of Defense and state officials to decide the issue and promulgate regulations.[377] A recent federal court decision[378] found munitions were hazardous wastes for the purpose of a lawsuit based on the RCRA's imminent and substantial endangerment provision.[379]

Until the munitions issue is resolved, states may be able to use their public trust law to bolster their RCRA authority. States are free, in the absence of preemptive federal regulations, to impose more stringent standards upon hazardous waste generators that the RCRA imposes.[380] Protection of public trust resources would justify such a move for hazardous waste activities that affect the trust corpus. By defining hazardous waste to include spent and dud munitions, states would subject military training to extremely cumbersome regulatory requirements, which could include recovering spent and dud munitions from the seabed.[381] States can also use their public trust law to justify reducing the threshold, from imminent and substantial endangerment, to a lesser standard more protective of public trust resources. In either case, the impact on military

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[375] *See* 42 U.S.C. §§ 6972(a), 6973(a) (1988 & West Supp. 1993).

[376] Hazardous waste is elaborately defined in 40 C.F.R. § 261.3 (1992). Figures 1 through 3 following 40 C.F.R. part 260 provide a good overview of the definitional process.

[377] FFCA, *supra* note 373, § 107; 42 U.S.C. § 6924(y) (West Supp. 1993).

[378] Connecticut Coastal Fishermen's Ass'n. v. Remington Arms Co. Inc., 989 F.2d 1305 (2d Cir. 1993). The United States Court of Appeals for the Second Circuit declined to rule on whether munitions are hazardous wastes from the RCRA regulatory standpoint. That definition is different. Thus, under *Remington Arms*, neither the state nor the EPA can authoritatively claim that it has the power to regulate military munitions or training ranges under a RCRA permit. From a judicial standpoint, the issue remains open.

[379] 42 U.S.C. § 6973 (1988).

[380] *Id.* § 6929.

[381] Once the EPA promulgates its munitions regulations, any state law to the contrary might be preempted. Whether the state could justify its contrary position based on a unique need to protect its trust corpus would present an interesting issue. Of course, the EPA ultimately may promulgate regulations that declare munitions to be hazardous waste once they leave the weapons system.

[382] The money and manpower necessary to track and recover munitions from the bed of the marginal sea is nearly incalculable. Live-fire training exercises would

training would be devastating.[382]

4. Public Nuisance Law—Regardless of whether the EPA finds munitions to constitute hazardous waste, states may utilize their public nuisance statutes to reduce or eliminate military activities that cause munitions to come to rest in public trust waters.[383] Nuisance law may also present states with the ability to limit noise caused by military training, and to prevent military restrictions from interfering with commercial fishing and recreation. Congress has waived sovereign immunity for tort actions in the Federal Tort Claims Act (FTCA).[384] Courts have found state public nuisance laws to create cognizable causes of action under the FTCA.[385]

Unlike actions brought under the RCRA, there would be no need for states to wrestle with whether munitions are hazardous wastes. Instead, they would only need to prove that the military action unreasonably interfered with a public right. Public trust interests, such as commercial fishing and access to the trust corpus, would supply the public rights in this equation. States would have to demonstrate that military training causes some harm. But a court may be inclined to reduce the degree of harm required in an effort to err in favor of preservation of public trust interests. Because national security is not a recognized public trust interest in state public trust law, the judicial balance would lean toward states.[386]

The remaining issue in a nuisance action would be preemption. Once again, the outcome would turn on whether a direct conflict existed between military training and the state's enforcement of its

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likely be curtailed or eliminated as a result. And without those exercises, military training becomes unrealistic—preparedness declines. Naval forces simply cannot train for amphibious operations without understanding the full effects of live-fire operations. *See generally* U.S. MARINE CORPS, FMFM 1, WARFIGHTING (Mar. 6, 1989). The gulf between training and combat becomes too wide to bridge when the time comes to commit American forces to action.

[383]California specifically states that its coastal management program does not limit the state's ability to abate a nuisance. CAL. PUB. RES. CODE § 30005 (1986 & 1994 Supp.).

[384]28 U.S.C. §§ 1291, 1346(b), 1346(c), 1402(b), 2401(b), 2411, 2412(c), 2671-2680 (1988).

[385]Barcelo v. Brown, 478 F. Supp. 646, 662 (D.P.R. 1979) *aff'd in part and vacated in part on other grounds*, 643 F.2d 35 (1st Cir. 1981), *rev'd on other grounds sub nom.*, Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).

[386]A different result might occur if a federal public trust doctrine existed, because national security would be a protected public interest. Whether a state or individual citizen could challenge military training under the federal common law of nuisance is another matter. A federal court might be reluctant to create a federal nuisance remedy because of the existence of other federal laws that govern coastal waters; e.g., the Coastal Zone Management Act and the Submerged Lands Act. For an analysis of federal common law and public nuisance, see both Illinois v. Milwaukee, 406 U.S. 91 (1972), and Milwaukee v. Illinois, 451 U.S. 304 (1981).

nuisance law. If the state attempted to preclude military training entirely rather than impose reasonable restrictions on it, a court would probably find that the state law was preempted.[387]

5. Army Corps *of* Engineer Permits—In addition to using their public trust laws to regulate military activity directly, another means states can employ to protect their trust corpora is to force federal agencies to factor state public trust law into their land use decisions.

Both the Rivers and Harbors Act[388] and the Federal Water Pollution Control Act[389] charge the Secretary of the Army, through the Army Corps of Engineers (ACOE), with making decisions regarding the use of navigable waters. Specifically, section 10 of the Rivers and Harbors Act authorizes the ACOE to issue permits for construction, excavation, or deposit of spoils in navigable waters, and for "any other work affecting the course, location, condition, or capacity of such waters."[390] Under section **404** of the Federal Water Pollution Control Act, the ACOE is authorized to issue permits for the "discharge of dredged or fill material into the waters of the United States."[391] Federal agencies must secure permits in the same manner as private entities.[392]

Permit decisions flow from a two-step process. The ACOE must first determine whether to allow the activity to proceed at all. If so, then the ACOE determines what restrictions to place on the permit. The vehicle the ACOE uses to make this decision is known as "public interest review."[393] That review is a "general balancing process" which "should reflect the national concern for both protection and utilization of important resources."[394] Among the factors the ACOE considers in the public interest review are impact on "[f]ish and wildlife"; "scenic and recreational values"; compliance with the Coastal Zone Management Act; and "[o]ther Federal, state, or local requirements."[395] Unrecognized as a direct factor in the public interest review is national security.

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[387]Another preemption argument would arise concerning the RCRA. Statutory environmental schemes can preempt public nuisance laws. Milwaukee v. Illinois, 451 U.S. 304 (1981). Here, the question would be whether the RCRA and the FFCA preclude states from regulating munitions as anything other than hazardous wastes. ***See*** *also* National Audubon Society v. Department of Water, 869 F.2d 1196 (9th Cir. 1988).

[388]33 U.S.C. §§ 401-467n (1988).

[389]*Id.* § 1344.

[390]33 C.F.R. § 320.2(b) (1993).

[391]33 U.S.C. § 320.2(f) (1993).

[392]33 C.F.R. §§ 322.3(c), 323.3(b) (1993).

[393]*Id.* § 320.4(a).

[394]*Id.* § 320.4(a)(1).

[395]*Id.* § 320.4.

The ACOE will consider state concerns about the pending permit even if states do not have a separate permit requirement of their own.[396] This is so because "[t]he primary responsibility for zoning and land use matters rests with state, local and tribal governments."[397] State concerns will normally prevail unless "significant issues of overriding national importance," such as "national security," are present in a sufficient degree to counter those concern. Each public interest review is distinct. The weight assigned to a particular factor "is determined by its importance and relevance to the particular proposal."[399]

These permit decisions afford states a dual opportunity to utilize their public trust law to regulate or affect military activities. First, they can incorporate their public trust laws into their coastal management programs under the Coastal Zone Management Act. The ACOE has to consider a consistency determination in making the permit decision.[400] Secondly, state officials can communicate their concerns about the proposed military activity and its effect on public trust lands and waters directly to the ACOE. An ACOE official is then faced with balancing state interests against national security needs.

Although some may discount this opportunity because the ACOE is a Department of Defense agency, it gives the state yet another forum in which to advance its public trust interests. The ACOE is a distinct federal agency, obligated to consider all factors in its public interest review. Other Department of Defense agencies should not expect the ACOE to rubber stamp their section 10 or section 404 permit applications. Additionally, unlike the case with a consistency determination, the project's proponent is not the agency evaluating the state's public trust concerns.

6. *Special*-Use Airspace Determinations — Similar to the ACOE permit reviews are the Federal Aviation Administration's (FAA) reviews of requests for designation of special-use airspace.[401] Special-use airspace consists of an imaginary three-dimensional box in the air that is restricted for a certain purpose, often military.[402]

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[396] *Id.* § 320.4(j)(1).

[397] *Id.* § 320.4(j)(2).

[398] *Id.*

[399] *Id.* § 320.4(a)(3).

[400] *Id.* § 320.4(h).

[401] Section 307 of the Federal Aviation Act of 1958 gives the FAA authority to designate special-use airspace. 49 App. U.S.C. § 1348 (West 1990).

[402] 14 C.F.R. § 73.3 (1993).

Designations flow from a formal rulemaking process.[403] Military agencies have to petition the FAA to designate the airspace and subsequently justify its continued existence via annual reports.[404]

States have the opportunity to comment on the airspace designation. They can attempt to convince the FAA that a hearing is necessary before the FAA renders a decision. Hearings are discretionary[406] but, if granted, they are usually held "in the vicinity of the affected airspace."[407]

In designating special-use airspace, the FAA must consider "the requirements of national defense, and of commercial and general aviation, and to the public right of freedom of transit through navigable airspace."[408] In so doing, it has wide discretion.[409] The FAA can revoke or modify a special-use airspace designation "when required in the public interest."[410]

By submitting comments during the formal rulemaking process, states can attempt to demonstrate the adverse impact that military aviation activities will have upon their public trust assets. They can also point to conflicts between the proposed designation and state law and policy. For example, North Carolina has a policy limiting special-use airspace designations over its barrier islands.[411] If states can persuade the FAA to hold a public hearing, they can broaden the scope of their challenge from solely administrative to political, as well. State espousal of public trust values carries considerable political weight, and may cause the FAA to scale down, if not deny, the military's special-use airspace request.[412]

7. National Environmental Policy Act *(NEPA)*—Federal agencies must consider the impact of their proposed activities upon the

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[403]*Id.* §§ 11.61 to 11.75.

[404]*Id.* §§ 11.61 to 11.75, 73.19.

[405]*Id.* § 11.65.

[406]*Id.* § 11.67.

[407]*Id.*

[408]49 App. U.S.C. § 1347 (West 1990).

[409]*In re* Braniff Airways, Inc., 700 F.2d 935, (5th Cir.), *reh'g denied* 705 F.2d 450 (5th Cir. 1983).

[410]49 App. U.S.C. § 1348(a) (West 1993).

[411]N.C. ADMIN. CODE T15A: 07M.0902 (1992). State airspace regulations are not necessarily preempted by FAA rules. ***See*** County of Westchester v. County of Greenwich, Connecticut, 793 F. Supp. 1195 (S.D.N.Y. 1992); Wood v. City of Huntsville, Alabama, 384 So.2d 1081 (Ala. 1980); Aircraft Owners and Pilots Ass'n v. Port Authority of New York, 305 F. Supp. 93 (D.N.Y. 1969).

[412]Consider the references to public trust values in the legislative history of the Coastal Zone Management Act. ***See*** 136 CONG. **REC.** H8071-72 (1990); H. **REP.** NO. 1012, ***supra*** note 262, at 16, 19, 32 ***reprinted in*** 1980 U.S.C.C.A.N. 4364, 4367, 4380.

"human environment" in accordance with the NEPA.[413] Agency consideration takes the form of informed decision making through the use of detailed written analyses supported by environmental studies. Three levels of analysis are possible: (a) an environmental impact statement that comprehensively covers the environmental impact of the proposed action and provides substantial opportunities for public comment and participation;[414] (b) an environmental assessment that provides sufficient information to determine whether the proposed action will require comprehensive analysis via an environmental impact statement, or whether the proposed action will not significantly affect the human environment;[415] or (c) a decision that the proposed action falls within those actions that the agency has determined are categorically excluded from NEPA analysis.[416] The NEPA mandates no particular outcome. Instead, its purpose is to foster better decision making by federal officials.[417] Although encouraged to protect and enhance the environment,[418] agencies are free to choose any alternative so long as their decisions are properly documented.[419]

State public trust law plays a role in the NEPA process. At a minimum, federal agencies must consider the impact their proposed actions will have upon state public trust resources. In addressing such impact, federal agencies must also consider the significance attached to those resources under state law.[420] This may shift the balance when federal officials consider various alternative actions, as NEPA requires.[421]

State public trust law may also preclude a determination that the proposed action is categorically excluded from NEPA review. The Department of the Navy's NEPA regulations disallow use of a categorical exclusion when, among other things, the proposed action "[t]hreatens a violation of. . . state . . . law or requirements imposed

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[413]The NEPA is codified at 42 U.S.C. §§ 4321-4370a (1988). "Human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14 (1993).

[414]40 C.F.R. § 1501.4, pt. 1502 (1993).

[415]*Id.* §§ 1501.3, 1508.9.

[416]*Id.* §§ 1507.3(b)(2)(ii), 1508.4.

[417]*Id.* § 1500.1.

[418]*Id.* § 1500.1(c).

[419]Foundation on Economic Trends v. Lyng, 943 F.2d 79 (D.C. Cir. 1991).

[420]Rankin v. Coleman, 394 F. Supp. 647 (D.N.C. 1975) *mod. on other grounds* 401 F. Supp. 664. State officials are sure to point this out when they review the draft environmental impact statement or the finding of no significant impact.

[421]40 C.F.R. § 1502.14 (1993).

for the protection of the environment."[422] As a result, federal agencies may have to allot the time and spend more money for environmental assessments when public trust resources are involved.

Finally, states can seek injunctive relief if federal agencies fail to comply with the NEPA.[423] Failure to adequately consider state public trust resources and public trust law may cause a court to find the agency's actions deficient.

8. Cooperative Land *Use* Agreements—Federal land use policy encourages military commanders to enter into cooperative agreements with state governments to better manage natural resources on military installations.424 This may prove a useful tool in negotiations to expand military training areas in America's coastal areas—a means to ensure states that military commanders will heed rather than ignore environmental concerns. But military officials should be careful when negotiating an interagency agreement of this nature. States may insert language into the agreement that appears innocuous yet applies state public trust principles to military land use decisions.

Consider the holding in National Audubon Society *v.* Superior Court *of* Alpine *County*.[425] California's Supreme Court ruled that the State Water Resources Control Board could not divert water from Mono Lake's tributaries without considering the impact of that diversion upon the public trust. Incorporation of state public trust principles into an interagency agreement might produce the same result. State officials, as trustees for the public, might have a quasi-due process right to compel military decision makers to at least justify in writing their land use decisions.[426] If the threshold that triggered such quasi-due process right was low enough, military commanders would have to justify their decisions in cases where neither NEPA nor Coastal Zone Management Act determinations were necessary.

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[422]32 C.F.R. § 775.6(e)(5) (1993). The Department of Defense NEPA regulations prohibit use of a categorical exclusion if the proposed action involves "endangered species, archeological remains, or other cultural, historic, or protected resources." *Id.* § 188, encl. 1, ¶ B.6.d(3).

[423]Courts will not automatically issue an injunction. Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152 (9th Cir. 1988). State agencies have standing to sue. Sabine River Authority v. United States Dep't. of Interior, 745 F. Supp. 388 (E.D. Tex. 19901, *aff'd* 951 F.2d 669.

[424]16 U.S.C. §§ 670a, 670c-1 (West Supp. 19931. Congress appropriated funds to encourage development of these agreements. *Id.* § 670f.

[425]National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983). *See supra* text accompanying notes 64-79.

[426]PUBLIC TRUST DOCTRINE, *supra* note 10, at 242.

9. Inverse Condemnation—Military activities that disrupt the use of non federal lands to such a degree that people can no longer use those lands for a reasonable purpose can result in a partial, unintentional taking of those lands.[427] This is usually established in an inverse condemnation action brought by the property owner. Typically, inverse condemnation occurs when military aircraft overfly non federal lands at low altitudes and with such frequency and noise that the lands below cannot be used for anything but growing crops. When inverse condemnation occurs as a result of aircraft overflights, the federal government obtains a navigation easement in the air above the property.[428]

Other invasions of non federal property may also allow for inverse condemnation.[429] In the context of this article, states may have a partial taking claim if they can prove the buildup of spent and dud munitions on the floor of the marginal sea renders those lands useless for other purposes, such as commercial fishing.[430] A literal interpretation of the Submerged Lands Act vests coastal states with ownership of those lands, so it would appear states would be the proper parties to assert those claims.[431]

Military agencies could counter inverse condemnation claims in three ways. First, they could dispute the degree of invasion of the property. Secondly, they could argue that the paramount right of national defense, as expressed in the Submerged Lands Act,[432] includes the right of the United States to partially take lands as necessary for military preparedness. This argument is weakened by the subsequent provision in the Act that states the federal government will purchase natural resources found in the marginal sea from the states.[433] Finally, military agencies could argue that the states have control, but do not own, the marginal seabed. An affirmative defense of nonownership would force a court to resolve the question that the

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[427]The seminal case in this area is United States v. Causby, 328 U.S. 256 (1946). *See also* Branning v. United States, 654 F.2d 88 (Ct. Cl. 1981).

[428]*Branning*, 654 F.2d 88. *See also* Army regulation on unintentional condemnation, 32 C.F.R. § 644.103(a) (1993).

[429]32 C.F.R. § 644.102 (1993).

[430]The Submerged Lands Act increases the likelihood of a successful taking claim. "It denies the right of the National Government to take and use any elements in the bed of the ocean necessary for national defense, without paying therefore in accordance with the law of eminent domain." H. REP. NO. 1778, 80th Cong., 2d Sess., (1950), reprinted in 1953 U.S.C.C.A.N. 1463. State lands are "property" within the meaning of the Fifth Amendment. United States v. 50 Acres of Land, 469 U.S. 24 (1984).

[431]43 U.S.C. §§ 1311(a), 1314(a) (1988).

[432]*Id.* § 1314(a).

[433]*Id.* § 1314(b).

Supreme Court has danced around for many years: whether anyone can actually own the lands beneath the oceans.[434]

C. Citizens' Suit to Challenge State Public Trust Decisions

Scenario: *State and military officials have concluded a license agreement that authorizes military live-fire training in a state's coastal region. Training will affect public trust resources and impinge upon public rights of* access *and navigation, but the state agency is comfortable that the agreement contains sufficient restrictions to preclude any lasting harm to the trust corpus.* ***An*** *active citizens' environmental organization disagrees with the state agency. It brings suit to enjoin actions under the agreement.*

This scenario contemplates citizen enforcement of public trust rights. It is in this situation that the problematic nature of citizens being both the trustees and beneficiaries of the trust comes into play.[435] As indicated earlier, courts have found that citizens have standing to challenge governmental decisions regarding public trust resources.[436] If the federal government did not opt to intervene in the action on its own, the citizens might be able to otherwise force joinder under the Administrative Procedures Act.[437]

The primary question in this type of challenge is whether the citizens can convince a court that the state agency's action is tantamount to alienation.[438] If so, the court would carefully scrutinize the transaction to determine if the alienation was in the public interest.[439] Prior federal and state agency decisions would carry lit-

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[434] *See* supra text accompanying notes 299-309. **A** court could split hairs still further and find that the states have superior interest in the lands that justifies compensation for partial takings. While that type of finding might be the most expedient way to resolve the issue, it would do little to clarify the parameters of the federal government's paramount powers in the marginal sea.

[435] *See* supra text accompanying notes 62-103.

[436] ***See supra*** text accompanying notes 104-48.

[437] 5 U.S.C. §§ 701-706 (1988).

[438] Citizens might do this by introducing evidence that military exercises damage public trust resources to such a degree as to render them useless for their intended purposes. This argument would be difficult to sustain because it requires the plaintiffs to demonstrate prospective harm. Analogizing to other military training areas would prove difficult in light of judicial determinations that military activities may actually preserve the environment. See Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979) aff'd *in* part, vacated *in* part *on* other grounds, 643 F.2d 35 (1st Cir. 19811, *rev'd on* other *grounds sub nom.,* Weinberger v. Romero-Barcelo. **456 U.S.** 305 (1982).

[439] *See* supra text accompanying notes 64-79. Of course, a court could adopt the "deliberate and reasonable" standard of West Indian Company. West Indian Co. v. Government of the Virgin Islands, 844 F.2d 1007 (3d Cir. 1988). We must be careful to distinguish alienation by a legislature, however, from alienation by a state administrative agency. Courts are less likely to view the latter as representatives of the sovereign people. ***See*** supra note 146 and accompanying text.

tle, if any, weight.[440] Military use of public trust lands should not be found violative of the primary purpose test, as national security is in everyone's interest. Military training is the essence of preparedness for combat. As opportunities to train decline, so does the security of our nation. Nonetheless, a court could treat the United States as a proprietor in a real estate transaction rather than as a sovereign. This depends on congressional intent and the nature of the federal interest in the land.[441] If Congress expressly authorized the military agency to acquire the land for national defense, then a court would probably treat the United States as a sovereign. On the other hand, if a military agency simply obtained a license from a state agency to use public trust lands, a court might take a more narrow view.

The citizens might then successfully argue that the state agency lacked authority to conclude the agreement. Citizens could assert one of two legal theories for this proposition. First, the state legislature unconstitutionally delegated its alienation authority to a state agency.[442] Secondly, the citizens could argue the state agency exceeded its delegated power, i.e., its action was ***ultra vires.*** If, on the other hand, a court found the agreement was a mere license, it would likely reduce its level of scrutiny to a review for abuse of agency discretion.

D. Federal Accommodation of State Interests

One aspect of federal-state relations for which military attorneys should be prepared is accommodation. It may play a large role in any actual conflicts that parallel the scenarios just described. Assertion of superior federal authority over coastal lands and waters runs counter to a visible federal policy that seeks to accommodate state interests. This policy extends to all three branches of the federal government.

Federal courts have subordinated federal rights to states through narrow rules of preemption.[443] States have been allowed to: build bridges that interfere with navigation;[444] regulate fishing in United States territorial waters;[445] and control the anchorage and

[440] Lake Mich. Fed'n v. United States Army *Corps* of Engineers, 742 F. Supp. 441 (N.D. Ill. 1990). Underlying this court's decision to disregard federal and state agency determinations was its decision to disregard the ultimate voice of the people, the Illinois Legislature. This harkens back to ***Illinois Central.***

[441] *See supra* text accompanying notes 15-21.

[442] *See supra* note 146.

[443] *See supra* text accompanying notes 157-97.

[444] Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1865).

[445] Skiriotes v. Florida, 313 U.S. 69 (1941); Manchester v. Massachusetts, 139 U.S. 240 (1891).

moorings of boats in areas subject to Coast Guard authority.[446] In the area of environmental regulation, states have been able to require that federal agencies obtain state permits.[447]

Executive branch policy is also accommodative. During the controversy over oil in offshore waters, President Truman signed the Pacific Marine Fisheries Compact to allow California, Oregon, and Washington to regulate fishing in coastal waters.[448] President Clinton made federal agencies subject to the chemical reporting requirements of the Emergency Planning and Community Right to Know Act[449] in an effort to give state planners a better idea of what chemicals are present in their communities.[450] President Reagan even signed an executive order that requires federal agencies to adopt federalist policies: Executive Order 12,612.[451] Among other things, Executive Order 12,612 establishes a presumption of state sovereignty "[i]n the absence of clear constitutional or statutory authority [to the contrary]."[452] To implement this policy, Executive Order **12,612** requires federal agencies to conduct a "federalism assessment" of any proposed policies, regulations, or legislation.[453]

In those instances when both the executive and judicial branches have found it proper to subordinate states' environmental requirements to federal power, Congress has responded by adjusting the balance to favor the states. Congress responded in this manner following the Supreme Court's ruling in *United States v. California.*[454] The result was the Submerged Lands Act. Congress also amended the Coastal Zone Management Act in 1990 to overturn the result of *Secretary of the Interior v. California,*[455] thereby extending state influence over federal activities. Lastly, Congress responded to the Court's findings that neither the Clean Air Act nor the RCRA completely waived sovereign immunity, with amendments to reverse those findings.[456]

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[446]Murphy v. Department of Natural Resources, 837 F. Supp. 1217 (W.D. Fla. 1993); Beveridge v. Lewis, 939 F.2d 859 (9th Cir. 1991).

[447]California Coastal Comm'n v. Granite Rock, 480 U.S. 572, 580 (1987); Friends of the Earth v. Navy, 841 F.2d 927 (9th Cir. 1988).

[448]61 Stat. 419 (1948).

[449]42 U.S.C. §§ 11001-11050 (1988 & West 1993).

[450]Exec Order No. 12,856, 58 Fed. Reg. 41981 (1993).

[451]Exec. Order No. 12,612, 52 Fed. Reg. 41685 (1988).

[452]*Id.* § 2(i).

[453]*Id.* § 6.

[454]332 U.S. 19 (1947).

[455]464 U.S 312 (1984).

[456]*See* Ohio v. Department of Energy, 112 S. Ct. 1627 (1992); Hancock v. Train, 426 U.S. 167 (1976). These cases precipitated amendments to the Clean Air Act in 1977, Pub. L. No. 95-95, 91 Stat. 685, and the RCRA in 1992 (Federal Facilities Compliance Act, Pub. L. No. 102-386, 106 Stat. 1505 (1992)).

Policies of accommodation in all three branches of the federal government make it difficult for military leaders to effectively voice their concerns over state impairment of coastal training activities. Even if those concerns funnel their way out of the Department of Defense and meet with the president's approval, it is unlikely that Congress would respond favorably.[457]

V. Recommended Action — Exclusive Defense Areas

Despite this hesitancy to use federal power to eclipse that of the states, there is a need for coastal training areas that give military commanders sufficient flexibility for realistic training. This need will grow as pressures on coastal areas increase and military budgets decline. Appended to this article is a draft bill that would create exclusive defense areas in the marginal sea. If enacted, the statute would place certain marginal waters under the control of the Department of Defense as an exercise of the federal government's paramount powers. Military actions would be subject only to review by other federal agencies. States would have no role in these matters under the Coastal Zone Management Act, the Submerged Lands Act, or their respective public trust laws.

Support for this type of legislation is likely to be sparse, unless the United States is suddenly thrust into a large armed conflict. Unless that happens, accommodation of state interests will continue. But there is another alternative. A court could wrest control of trust assets in the marginal sea from states by creating a federal public trust doctrine.

VI. Is There a Federal Public Trust Doctrine?

There is not a recognized public trust doctrine in federal common law, yet the law is poised to move in that direction. Federal land use statutes recognize many of the same interests that the public trust doctrine seeks to uphold. People are calling for a uniform system to ensure the wise use of lands and waters. Judges, for a long time, have referred to the federal government as generally holding public lands and waters in trust for the people. Within the geographic reach of the state public trust doctrine, the federal government has its navigational servitude: a dominant interest in land

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[457] Unlike the states and private interests, the military lacks a formal congressional lobby. S. REP, No. 133, 83d Cong., 1st Sess., (1953), *reprinted in* 1953 U S.C.C.A.N. 1643.

very similar to the *jus publicum*. Given the appropriate facts, a court could expand the navigational servitude into a federal public trust doctrine as a logical progression of the law.

For many years Supreme Court justices have referred to the federal government's obligation over public lands and waters as a trust obligation.[458] The manner in which they use the word "trust," however, is most often casual and with little elucidation.[459] No distinction has been made between public lands and navigable waters—these offhand references to a trust appear to apply to both.

When called upon to actually render a decision about the existence of a federal public trust doctrine, lower court judges have moved more cautiously. In its suit to force Air Florida to remove the debris from a fallen jetliner in the Potomac River, the District of Columbia belatedly attempted to assert a federal public trust claim on appeal. The court responded,

> Our decision not to consider the District's public trust claim is reinforced by our belief that the argument that public trust duties pertain to federal navigable waters . . .

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[458] Alabama v. Texas, 374 U.S. 272, 273-74 (1954) (per curium); United States v. California, 332 U.S. 19, 39-40 (1947); United States v. San Francisco, 310 U.S. 16, 29 (1939); Light v. United States, 220 U.S. 523 (1911); Shively v. Bowlby, 152 U.S. 1, 30 (1893); United States v. Trinidad Coal Co., 137 U.S. 160, 170 (1890) ("All the public lands of the nation are held in trust for the people of the whole country.").

[459] Nonetheless, some commentators say that a federal public trust doctrine exists:

> the years between 1870 and 1920 also saw the evolution of a substantial body of important federal public trust rights governing the disposition and development of navigable waterways, mineral resources and the remaining public domain. The articulation of these federal public trust rights by the federal courts resulted, in some instances, in the appropriation of trust powers by the federal government that had traditionally resided in the states as sovereign powers. This development, which was consistent with the general political trend toward centralization of federal power during those years, constituted an important legal precedent for the assertion, during the mid-twentieth century, of even broader federal trust powers over the reservation or disposition of wilderness areas and offshore oil reserves.

Selvin, ***supra*** note 14, at 10. While Selvin's dissertation is an invaluable resource regarding the historical perspective of public trust law and policy, her identification of public trust decisions is too broad. The authors of the *Public Trust Doctrine*, **see** PUBLIC TRUST DOCTRINE, ***supra*** note 10, were more careful. While they begin their chapter on federal-state relations with the assertion that "the federal government [has] public trust responsibilities itself over trust lands, waters, and resources," *id.* at 299, they later state

> At the very least, [state] coastal managers should take the position that, despite the relative paucity of law on the subject, both State and federal governments are presumptively bound to honor the public trust in any shorelands they control, in absence of any clear evidence of congressional intent to the contrary.

Id. at 313.

> raises a number of very difficult issues concerning the rights and obligations of the United States (which is not a party here), the creation of federal common law, and the delegation of trust duties to the District.[460]

Rather than create a federal public trust doctrine, some judges would prefer to rely on federal statutes. As noted above, many federal statutes have public trust values imbedded in them, so courts see no need to address similar issues in a common law vice statutory context.[461]

Two cases have holdings that recognize a federal public trust doctrine: *In re Steuart Transportation Company*[462] and *United States v. 1.58 Acres of Land*.[463] In *Steuart*, the court found the United States and Virginia had claims based on either public trust law or a *parens patriae* theory to recover money damages for the destruction of waterfowl caused by an oil spill. The court's analysis is brief. It recognized that the governments did not own the birds. Unwilling to leave the birds unprotected, however, the court found them a resource protected by public trust law.

The issue in *1.58 Acres* was not enforcement of a federal right, but a condemnation action by the federal government. The court found that the United States had taken the land from Massachusetts subject not to the Commonwealth's public trust interest, but subject to a joint public trust interest. It found the United States and Massachusetts were cotrustees of the same trust corpus. The federal government's trust duties pertained to commerce, navigation, and national defense, while the Commonwealth's duties pertained to all else.

At first, this division of trust duties and responsibilities sounds appealing — a nice compromise. But a closer look finds it both

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[460] District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1078 (D.C. Cir. 1984).

[461] Conservation Law Foundation v. Watt, 560 F. Supp. 561 (D. Mass. 1983). In this case, the court found that the Secretary of the Interior violated the Coastal Zone Management Act and National Environmental Policy Act. On a motion for summary judgment the court found that the Foundation's public trust claims were "adequately addressed by the balance of the plaintiffs' complaint," and refused to address them. *Id.* at 580. The case was affirmed *sub nom.*, Commonwealth of Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983), but the Foundation did not assert its public trust claim on appeal. In Sierra Club v. Andrus, 487 F. Supp. 443 (D. D.C. 1980), the court found that the Secretary of the Interior had no independent public trust duty to protect public lands. His duty was considered purely statutory, as stated by congressional committee in the legislative history of the National Park Service Organic Act, 16 U.S.C. § 1. This case was affirmed *sub nom.*, Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981) where once again the plaintiff only appealed the statutory issue.

[462] 495 F. Supp. 38 (E.D. Va. 1980).

[463] 523 F. Supp. 120 (D. Mass. 1981).

impractical and unsound. As the district court in 1.58 *Acres* relied on Justice Black's opinion in *United States v. California*,[464] it is best to start there to uncover the flaws in the cotrustee theory.

Justice Black was moving toward a federal public trust doctrine. Whether he did so unwittingly or purposely stopped short of such a move will probably never be known. But consider for a moment his decision and the events that took place in its aftermath: they loosely fit into a public trust paradigm. Justice Black found the coastal areas of the United States were of prime importance to the federal government for national defense and international relations purposes. He intimated the resources underlying coastal waters were held in trust for the benefit of all Americans. Individual states were not legally competent to control the exploitation of those resources-devalue the corpus of the trust—because they did not act for the benefit of the entire citizenry of the United States as trust beneficiaries.

Congress responded to *United States v. California* with the Submerged Lands Act. In that Act, Congress, on behalf of the sovereign people, determined that states could play an appropriate role in the administration of natural resources in the marginal sea. It declared the states owned the lands under the marginal sea, subject to the exercise of certain paramount authority by the United States. This appears consistent with the Court's treatment of alienation of public trust lands in *Illinois Central Railroad v. Illinois:* only a legislative body representative of the entire beneficiaries can alienate public trust lands, and then only when to do so "promotes the interest of the public" or does not "substantial[ly] impair . . . the public interest in the lands and waters remaining."[465] Here, Congress was certainly the appropriate legislative body to take action, and its action arguably promoted the public interest.

Thus, both the Supreme Court's and Congress's treatment of the dispute over oil in the lands under the marginal sea is roughly consistent with a federal public trust doctrine. But the parallels end there. Rough consistency is not legal equivalency.

If a federal public trust doctrine exists, it must fit within the framework of the Submerged Lands Act and the judicial decisions that surround it. Returning to *United States v. California,* Justice Black's reference to the federal government holding lands "in trust"

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[464] 332 U.S. 19 (1947).

[465] Illinois Central R.R. v. Illinois, 146 U.S. 387, 453 (1892)

for the American people must be taken in context.[466] He used those words in response to an argument by California that the United States had sat on its rights. In voicing his disagreement, Justice Black noted that the equitable defenses of laches, estoppel, and adverse possession do not bar a claim by the United States. The federal government's rights cannot be abridged by persons not authorized by Congress to waive them. This is a principle based on sovereignty; it is not unique to public trust law.[467] Additionally, the way in which Justice Black used the word "trust" was as casual as in other relevant Supreme Court opinions.[468] He certainly made no effort to directly connect his paramount powers doctrine to the public trust doctrine.

Paramount powers theory differs from public trust law in that it connotes no obligation to preserve trust resources or to use them wisely. All Supreme Court decisions that use trust-like language concerning public lands give Congress unlimited authority to make land use decisions.[469] No judicial check on legislative power resides in the paramount power theory. This directly contradicts the Court's own role in *Illinois Central.*

Indeed, the Submerged Lands Act simply gives the coastal states the natural resources and submerged lands under the marginal sea to use as they wish. True, they cannot impede navigation, commerce, or national defense, but these federal interests do not stand in the way of utter depletion of a resource.[470] Only the indi-

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[466]The quote is its entirety reads as follows:

> The Government, which holds its interests here *as elsewhere* in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or United States v. California, failure to act.

332 U.S. at 40 (emphasis added).

[467]United States v. Summerlin, 310 U.S. **414** (1940); Guaranty Trust Co. of N.Y. v. United States, 304 U.S. 126 (1938); United States v. New Orleans Pac. Ry., 248 U.S. 507 (1919).

[468]*See supra* note 458.

[469]United States v. San Francisco, 310 U.S. 16, 29 (1939) ("Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy."); Ashwander v. TVA, 297 U.S. 288, 336 (1936) ("The United States owns the coal, or the silver, or the lead, or the oil, it obtains from its lands, and it lies in the discretion of Congress, acting in the public interest, to determine how much of the public property it shall dispose."); Light v. United States, 220 U.S. 523, 537 (1911) ("[I]t is not for courts to say how that trust shall be administered. That is for Congress to determine."); Shively v. Bowlby, 152 U.S. 1 (1893) (federal government can sell submerged lands to private parties while holding lands in trust for future states).

[470]Congress could choose to push the extent of its modern Commerce Clause power to prevent depletion of coastal resources by states. However, this would act to impliedly repeal the Submerged Lands Act, because such a heavy-handed move is inconsistent with the states' "right and power to manage, administer, lease, develop, and use [submerged] lands and natural resources." 43 U.S.C. § 1311(a) (1988).

vidual states' public trust laws do that—laws that states can weaken without federal intervention. Coastal states are thus free under the Submerged Lands Act to use littoral resources without regard to the needs or desires of the inland states.

This freedom contravenes the public trust doctrine. Public trust law requires governments to preserve trust resources for use by all beneficiaries, not a select few.[471] While ***Illinois Central*** implies that a state can delegate its public trust authority to a municipal government for a short time, the decision does not authorize complete abdication of state authority over submerged lands and their resources. Had the ***United States*** *v.* ***California*** Court created a federal public trust doctrine, it would have had a corresponding rule against abdication of power to lesser governments. The Court would then have been forced to strike down the Submerged Lands Act as an unconstitutional extension of congressional power. This did not occur.[472] In fact, in ***Alabama*** *v.* ***Texas,*** the Court found the Submerged Lands Act constitutional precisely because Congress has unlimited power over federal property.

Aside from the unsound reasoning of *1.58 Acres,*[473] the co-trustee concept it espouses is impractical. One sovereign has to decide what is best for the trust, not two. A joint decision by sovereigns, with sometimes divergent interests, begs for compromise. And, compromise decisions would serve only to gradually diminish the trust's value.

The method the *1.58* ***Acres*** court suggests for dividing trustee responsibility is equally unsatisfactory. By limiting the federal sphere of concern to national defense, navigation, and commerce commerce in the sense expressed in the Submerged Lands Act—the United States lacks the power to protect the trust corpus for all Americans. On the other hand, to use a definition of commerce that is as broad as current interpretations of Commerce Clause power leaves the coastal states with virtually no role in the administration of the trust.

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[471] *See* Alabama v. Texas, ***374*** U.S. ***272 (1954)*** (per curium) (Black & Douglas JJ., dissenting); Borough of Neptune City v. Borough of Avon-by-the-Sea, ***294*** A.2d ***47*** (N.J. ***1972).***

[472] Justice Black took issue with the Alabama *v.* Texas per curium decision but, as stated in the text, one cannot construct a federal public trust doctrine based on the United States *v.* California decision alone.

[473] Seven years after the 1.58 Acres decision, a federal court on the opposite side of the country declined to follow ***1.58*** Acres on virtually the same facts. United States v. ***11.037*** Acres of Land, 685 F. Supp. ***214*** (N.D. Cal. ***1988).*** Unfortunately, the court misread 1.58 Acres as subjecting the federal government to state public trust law and used that as its basis to disregard the opinion.

Worst of all would be to split the difference. To allow the states to administer the trust for "non-preempted subjects" as the ***1.58 Acres*** court suggests, would require the cotrustees to examine each application of the doctrine using a lengthy preemption analysis before turning to the public trust issue. The practical result of the cotrustee notion is that it would delay decisions and undermine the value of the trust corpus.

Unsatisfactory as the ***1.58 Acres*** decision is, it does indicate that courts are thinking about a federal public trust doctrine. Both Congress and the president are conscious of public trust principles and duties as well. A number of federal statutes contain provisions that serve to protect interests also protected by the public trust doctrine. Highlighted in this discussion is the Coastal Zone Management Act, but it is far from the only one.

The legislative history of the Submerged Lands Act contains many references to public trust interests.[474] Such interests are found in: the National Environmental Policy Act;[475] the Federal Land Policy and Management Act;[476] the National Park Service Organic Act;[477] the Federal Water Pollution Control Act;[478] the National Marine Resources Protection Act;[479] and the Rivers and Harbors Act.[480] In his proclamation creating a 200-nautical-mile exclusive economic zone in the nation's contiguous waters, President Reagan announced the United States "has . . . sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and nonliving, of the seabed and subsoil . . . and jurisdiction with regard to . . . the protection and preservation of the marine environment."[481]

From these citations it is clear our national leaders, both legislative and executive, see the federal government as having some role in protecting public trust interests, even to areas 200 nautical miles distant from America's coasts.

A federal public trust doctrine would enhance rather than be subsumed by these statutes and the presidential proclamation.

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[474] S. REP. No. 133, 83d Cong., 1st Sess. (1953), ***reprinted in*** 1953 U.S.C.C.A.N. 1479-80, 1589; S. REP. No. 1592, 80th Cong., 2d Sess. (1950), ***reprinted in*** 1953 U.S.C.A.A.N. 1525; H. REP. No. 1778, 80th Cong., 2d Sess. (1950), ***reprinted in*** 1953 U.S.C.C.A.N. 1435-37.

[475] 42 U.S.C. §§ 4321, 4331 (1988).

[476] 43 U.S.C. §§ 1701-1784, 1701(a)(5), (7), (8), (11), (12), 1781(a), (b) (1988).

[477] 16 U.S.C. §§ 1, 1a-1 (1988).

[478] 33 U.S.C. §§ 1251-1387, 1251(a) (1988).

[479] 16 U.S.C. §§ 1431-1445, 1431, 1433 (1988).

[480] 33 U.S.C. §§ 401-467n, 426e, 4261 (1988).

[481] Proclamation No. 5030, 48 F.R.D. 10601 (1983).

Courts could utilize a federal public trust doctrine to ensure trust values were not denigrated by gaps between the statutes or technical loopholes in a single statute. Additionally, when two federal statutes conflicted, courts could call upon the federal public trust doctrine to effect a balance that best preserved the trust corpus.[482]

It is now apparent that although a federal public trust doctrine does not currently exist, such a doctrine could be of value. One question remains, however: How can a court create a federal public trust doctrine that does not conflict with the purpose behind the Submerged Lands Act? The answer may lie in expansion of the federal government's navigational servitude.

Every piece of land, private or governmental, underlying navigable waters is subject to the federal government's dominant navigational servitude. In this manner, it is like a state's *jus publicum*. There are, however, differences between the two. The navigational servitude creates no right in the people. Its principal purpose is to foster navigation, but it may reach into those broad areas of public concern embraced by Congress's Commerce Clause power.[483] Additionally, the servitude imposes no limit on congressional powers to alienate lands beneath navigable waters.

These differences do not create a particularly large or unbridgeable gap. If limited to waters seaward of the low water mark,[484] the federal government's paramount powers come into effect.[485] By linking the navigational servitude with paramount powers theory, all but one of the differences disappear.

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[482] *See supra* text accompanying notes 299-309.

[483] *See* Zabel v. Tabb, **430** F.2d 199 (5th Cir. 1970) (for purposes of determining scope of navigable servitude, "destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas, devastating, effect on interstate commerce); State of Alaska v. United States, 662 F. Supp. 455 (D. Alaska 1987) *aff'd* 891 F.2d 1401 (9th Cir. 1989) (court can consider shallow draft recreational boats—not just deep draft commercial vesselswhen determining whether a river is navigable in fact).

[484] Historically, the Supreme Court has treated navigable waters inland of the coastline as belonging to the states. Pollard's Lessee v. Hagan, 4 (3 How.) 212 (1845). ***See also*** United States v. California, 332 U.S. 19, 36 (1947). The Submerged Lands Act just codified that treatment. It is clear that the United States can exercise its navigational servitude there, Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913), but Justice Black's paramount powers doctrine applies only seaward of the coast. Arguably, the Submerged Lands Act extended the federal government's paramount powers inland because it makes no distinction in section 6(a) between the federal government's rights in inland versus seaward waters. I chose to limit my argument for the creation of a federal public trust doctrine to the area where both the navigational servitude and paramount powers definitely apply.

[485] Here I refer to paramount powers as espoused by Justice Black in ***United States v. California***, and not as used in section 6(a) of the Submerged Lands Act, **43** U.S.C. § 1314(a).

Justice Black created the paramount powers doctrine based upon the premise that no person or government owns the lands underlying the world's oceans. These lands are for all the people to enjoy. Yet to provide for their care and ensure their proper management, Justice Black realized they must be controlled by someone. Because these resources are primarily utilized for interstate and international commerce and comprise an area vital to national defense, he reasoned the federal government was the logical choice.

The Supreme Court has never expressly repudiated Justice Black's ownership theory.[486] Alienation of large portions of the marginal seabed to a private party would directly contradict this theory. Thus it is a simple task to limit alienation of the marginal seabed to the same exceptions placed upon lands subject to public trust law by the Court in *Illinois Central.*

Preservation of the resources in the marginal seabed was the primary reason behind the Court's opinion in *United States v. California.* Because courts have already held that the navigational servitude encompasses commerce and those things that substantially affect commerce, it would not be difficult to expand the servitude to encompass all of the interests protected by the public trust doctrine. Both are creatures of common law; both can change to reflect the needs of society,

Balancing is also a part of the paramount powers doctrine. The Supreme Court did not expect the federal government to authorize the wholesale exploitation of offshore oil deposits when it ruled against California. That was the federal government's chief fear if the Court left the deposits in California's hands. Rather, the Court had to anticipate some balancing of interests would occur when the lands came under federal control. By combining this implied need to balance under *United States v. California* with the express need to do so in the case of the navigational servitude, one arrives at the type of balancing of interests expected under public trust law.

Missing from this merger of paramount powers theory and navigational servitude law is the public's right to contest land use decisions under the public trust doctrine. This deficit can be overcome by borrowing federal common law standing rules and incorporating them into the newly formed federal public trust doctrine. Standing rests primarily on whether the plaintiff has an interest within the "zone of interests" the federal law seeks to protect.[487] Courts tend to answer to this question liberally. Society has a high degree of con-

[486] Nevertheless, reconciling nonownership with the constitutionality of the Submerged Lands Act is difficult. ***See supra*** notes **226-33** and accompanying text.

[487] Friends of the Earth **v.** Navy, 841 F.2d 927,932 (9th Cir. 1988).

cern for the environment and courts appear unwilling to thwart that concern through rigid standing rules.[488] Like the assets in state public trust corpora, the assets in the marginal sea are there for all people. It would be absurd to entrust the management of those resources to the federal government and then restrict people from contesting their misuse. Instead, it would make perfect sense to find preservation of the marginal sea and its resources within the zone of interest of every American, and allow each citizen the opportunity to enforce federal public trust law.[489]

Last among the hurdles to surmount in creating a federal public trust doctrine applicable to the marginal sea is the Submerged Lands Act. This is not easily overcome. That Act's purpose was to return control of the assets in the marginal sea to the coastal states. Creation of a federal public trust doctrine would tend to reverse the situation once again. With the help of a little writer's license, however, this apparent contradiction can be made to vanish, and the last obstacle overcome.

Imagine for a moment that a federal public trust doctrine was firmly in place before the federal-state dispute arose over offshore oil. Faced with the same decision over control of oil deposits off California's shoreline, the Supreme Court would have reached the same conclusion it did in *United States v. California*, but for a different reason. As a part of the federal trust corpus, there would have been no doubt that the federal government had the clear right to the oil. California would have been on notice that the federal government had a dominant interest in the land, a federal *jus publicum*. Imagine further, that Congress recognized the validity of the Court's decision. But, as the body vested with the people's will to manage the federal trust corpus, Congress thereafter determined that it was in the best interest of the people to delegate management of oil deposits in the marginal sea to the coastal states. With less fanfare and emotion than actually occurred, Congress would have then enacted the Submerged Lands Act.

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[488]This is well brought out in Humane Society v. Hodel, 840 F.2d **45** (D.C. Cir. 1988). ***Hodel*** analyzes the United States Supreme Court's treatment of standing in environmental actions in Sierra Club v. Morton, 405 US. 727, (1971), and United States v. S.C.R.A.P., 412 US. 669 (1972).

[489]One could argue this would overwhelm already overburdened federal courts. I disagree. There is no money that **flows** from public trust litigation. The remedy is to correct mismanagement or to halt a particular project. For this reason, I believe enforcement of a federal public trust doctrine would fall to those public interest groups that currently contest federal agency decisions under land use and environmental laws. Moreover, because most federal public trust litigation would be tied to federal statutory claims that would exist regardless of federal public trust claims, the number of lawsuits would increase only in those rare instances when the public trust doctrine provided the exclusive means to challenge federal agency action.

Viewed in this way, the Submerged Lands Act is a narrow statutory exception to federal public trust law: an exception to the rule that the federal government must manage trust resources. As with other owners of lands encumbered by the public trust, the coastal states have only a *jus privatum* interest in the lands.[490] Congress has looked at the issue and struck a balance. States can manage offshore oil deposits as well as other natural resources in the marginal sea, as long as the federal government itself does not need the resources. The provision in the Submerged Lands Act that allows the federal government to purchase natural resources "in time of war or when necessary for national defense" becomes a policy decision by Congress to compensate the states for the resources rather than simply take them without payment as the public trust doctrine allows.[491]

This imaginary construct squares with the Supreme Court's analysis of the Submerged Lands Act. Congress did not abdicate its constitutional role in ceding authority to the states. Instead, it exercised its paramount (or public trust) powers and delegated its authority to the coastal states. If the people become displeased with the way in which coastal states manage these resources, Congress has the power to revoke the grant of authority — it can repeal the

If presented with the appropriate facts, a court could now create a federal public trust doctrine that does not have the legal or practical shortcomings of the ***1.58 Acres*** decision. From the coastline seaward to three miles, coastal states would manage the use and exploitation of natural resources for the federal government. Management of resources seaward **of** three miles would lie, as it does today,[493] with the federal government itself.[494]

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[490] Another way to view this is that the states retain their ***jus publicum*** interests in the lands, but the federal government has a superior ***jus publicum*** right. This creates a two-tiered ***jus publicum*** approach to public trust law which might seem cumbersome. Yet, state public trust law has always recognized the federal government's superior right to lands under navigable waters in the form of the navigational servitude. Creation of a federal public trust doctrine does not alter this relationship, it simply expands the federal government's interests beyond those of mere navigation.

[491] 43 U.S.C. § 1314(b) (1988).

[492] Arguably, § 1311(a)(1) of the Submerged Lands Act gives the states more than a ***jus privatum*** interest in the lands and resources under the marginal sea. That may be true in the abstract. But the only way to reconcile the Act with the Supreme Court's opinions is to conclude that the federal government has retained an interest in the lands. It cannot be otherwise. If it were, Congress would have abdicated its constitutional authority in passing § 1311(a)(1) of the Act. To say that the retained federal interest is less than a ***jus publicum*** interest and the states' interests more than ***jus priuatum*** interests, is to split hairs unnecessarily.

[493] Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1988).

[494] The seaward extent of the United States trust corpus involves issues of international law and is thus beyond the scope of this article. Arguably, it extends at least as far as the Exclusive Economic Zone.

One of the interests protected by the federal public trust doctrine would be national defense. Although this represents an expansion of the reasons for use of the navigational servitude,[495] it would not come as a complete shock to states.[496] Virtually all federal environmental and land use statutes have a national defense exemption.[497] States are required to give priority to the siting of national defense facilities under the Coastal Zone Management Act.[498] And the Submerged Lands Act itself retains the federal government's "rights and powers of regulation and control . . . for the constitutional purpose of. . . national defense."[499] Creation of a federal public trust doctrine would give substance to that heretofore nebulous phrase. When necessary to ensure the armed forces of the United States have suitable training areas, the federal government would be able to exercise its *jus publicum* rights and take the lands without compensation. Compensation for the natural resources would be made as required by the Submerged Lands Act, or adequate access would be made to allow their continued exploitation. Ultimate control of the lands and waters would rest, as it should, with the federal government.

A federal public trust doctrine would not impose additional restrictions on military activities in the coastal areas of the United States. Instead, it would give military commanders more flexibility in land use decisions. Under the Coastal Zone Management Act, all federal activities in the coastal zones of each state must already be consistent with a particular state's public trust law.[500] Federal public trust law would likely be a conglomeration of borrowed states' law, so it would represent nothing new. Its singular difference would be a recognition of national defense as a protected public interest.

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[495] *See* United States v. 50' Right of Way or Servitude in, on, over, and Across Certain Lands Situated in Bayonne, Hudson County, N.J., 337 F.2d 956 (3d Cir. 1964); United States v. 412.715 Acres of Land, Contra Costa County, Cal., 53 F. Supp. 143 (N.D. Cal. 1943).

[496] Some members of the 80th Congress considered national defense within the scope of the navigational servitude. H. REP. No. 1778, 80th Cong., 2d Sess., (1950), *reprinted in* 1953 U.S.C.C.A.N. 1450-56.

[497] Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1)(B) (West Supp. 1993); Endangered Species Act, 16 U.S.C. § 1536(j) (1988); Federal Water Pollution Control Act, 33 U.S.C. § 1323(a) (1988); Resource Conservation and Recovery Act, 42 U.S.C. § 6961(a) (West Supp. 1993); Clean Air Act, 42 U.S.C. § 7418(b) (West Supp. 1993).

[498] 16 U.S.C. § 1452(2)(D) (West Supp. 1993).

[499] 43 U.S.C. § 1314(a) (1988).

[500] This is not true of states that have not yet incorporated their public trust law into their Coastal Management Programs; **see *supra*** text accompanying notes 260-98.

This would benefit those military installations that are subject now to state public trust law,[501] because federal trust law would preempt state trust law where the two conflicted.

Additionally, federal public trust law could also alter the outcome of military agencies' consistency determinations. As a body of federal law, the federal public trust doctrine would become "existing law applicable to [f]ederal agency operations."[502] If it required a federal agency to take an action that state law—public trust or otherwise—prohibited, the federal agency could ignore the state law. This is so because the federal public trust law would trigger the "maximum extent practicable" exception for consistency under the Coastal Zone Management Act.[503] Such a divergence could arise over a defense need to operate a coastal training area twenty-four hours a day. State law might deem such a need inconsistent with the recreational and ecological requirements of the area by not giving any weight to national defense matters.[504] A federal public trust doctrine, on the other hand, would attach significant weight to national defense. The federal decision maker would then not have the discretion to ignore national defense. All of the nation's needs as enunciated under the federal public trust doctrine would receive appropriate consideration: a fitting outcome as "[t]here is a national interest in the effective management, beneficial use, protection, and development of the coastal zone."[505]

VII. Conclusion

Public trust law puts the state in a unique position with its citizens: that of trustee to beneficiary. State governments have the duty to preserve or use wisely those resources that fall within the trust's scope. Because the public trust doctrine is a body of common law, both the character of the trust corpus and the interests the doc-

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[501] *See supra* text accompanying notes 192-97.

[502] 15 C.F.R. § 930.32(a) (1993).

[503] The "coastal zone" does not include land "subject solely to the discretion of or which is held in trust by the Federal Government, its officers, or agents." 16 U.S.C. § 1453(1) (West Supp. 1993). Under a federal public trust doctrine, a federal agency could exercise the *jus publicum* and take a portion of land for its needs. That action would "affect" the coastal zone and thus be the subject of a consistency determination. *Id.* § 1456(c). Later actions—those confined to the taken area, but not contemplated in the initial taking—may not require a consistency determination. The agency could argue its subsequent actions do not affect the coastal zone.

[504] Consider, e.g., North Carolina's policy on water-based military targets, N.C. ADMIN CODE T15A: 07M.1001 (Feb. 1990).

[505] 16 U.S.C. § 1451(a) (West Supp. 1993).

trine is designed to protect can vary. Today, the doctrine encompasses conservation of states' coastal resources.

Military units need to train in the nation's coastal areas in order to be ready to fight in the littoral areas of the world. Amphibious warfare training exercises are likely to conflict with states' duties to preserve trust corpora. When such training does, states can use a variety of legal mechanisms to enforce their public trust law. Federal agencies, including the military departments, are not immune from state laws merely because of their national status. To the contrary, a federal policy of accommodation cuts against using federal supremacy as a shield. Only in the rare case of a state banning military training in its coastal areas, would federal law preempt state public trust law. In all other cases, military planners should be prepared to address public trust concerns.

Lurking in the shadows is a federal public trust doctrine. If courts bring it to light, this new doctrine would serve military planners well. It would place national defense squarely within those interests protected by the public trust doctrine. This contrasts sharply with state public trust laws. But the contrast ends there. For the ultimate purpose of a public trust doctrine, state or federal, is to ensure that our coastal resources are wisely managed. A federal public trust doctrine would simply put the onus of balancing the interests in our nation's coastal waters where it belongs—with the federal government..

UNSCRAMBLING FEDERAL MERIT PROTECTION

MAJOR JOHN P. STIMSON*

I. Introduction

Career federal civil servants enjoy a wide range of job protections. They obtain their jobs based on merit rather than political patronage;[1] they can gain tenure, after which they may be removed or disciplined only for such cause as will promote the efficiency of the federal service;[2] and civil rights laws protect them from job discrimination based on race, color, national origin, sex, religion, disability, or age.[3] Until 1979, federal employees looked to the Civil Service Commission (CSC) to safeguard all these rights.

Civil Service Reform efforts in 1978 focused on the CSC. President Carter's Reorganization Plan Number 1[4] stripped the

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[1] Congress first prescribed a merit-based (as opposed to political spoils) system in 1883. Civil Service Act of 1883 (Pendleton Act), 22 Stat. 403. The President still fills certain positions, however, such as cabinet secretaries and the heads of independent agencies, through political appointment. *See infra* part II.A.

[2] The Lloyd-LaFollette Act provided for employees in the competitive service to gain tenure. Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 539,555 (codified as amended at 5 U.S.C. § 7513 (1994)). Certain excepted service employees gained competitive-service equivalent tenure opportunities following the Veterans Preference Act of 1944, Pub. L. No. 78-359.58 Stat. 387. The Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat 461 (1990), created tenure opportunities for most other excepted service employees. Career appointees to the Senior Executive Service gain tenure after one year. 5 U.S.C. § 3393 (1994). For an explanation of the various services within the civil service, *see infra* part II.A.

[3] *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (amending title VII of Civil Rights Act of 1964 by adding section 717 protecting federal employees and applicants from discrimination based on race, color, religion, sex, or national origin); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (protecting employees age 40 and over from discrimination on the basis of age); Act of Nov. 6, 1978, 92 Stat. 2982 (amending Rehabilitation Act of 1973 to prohibit discrimination on the basis of disability).

[4] Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1574 (1994), *and in* 92 Stat. 3781 (1978). The Reorganization Act of 1977, Pub. L. No. 95-717, 91 Stat. 29, authorized the President to prepare reorganization plans, submit them to both Houses of Congress for review, and implement them absent a

CSC of its responsibility for federal sector equal employment opportunity programs, policies, and complaints, and transferred that jurisdiction to the Equal Employment Opportunity Commission (EEOC). Reorganization Plan Number 2[5] effectively eliminated the CSC,[6] and, in conjunction with the Civil Service Reform Act of 1978[7] (CSRA), distributed the remaining functions between the new Office of Personnel Management[8] (OPM) and Merit Systems Protection Board[9] (MSPB). The CSRA also established a statutory basis for union representation of federal employees,[10] created the Federal Labor Relations Authority (FLRA) to administer and enforce the labor relations statute,[11] and authorized represented employees to pursue discrimination complaints and other employment disputes through negotiated grievance procedures.[12] The reorganization plans and the CSRA dispersed authority and responsibility that the CSC had accumulated over the previous ninety-five years.

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one-house legislative veto. The Supreme Court cast doubt on the constitutionality of this process in Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983), which held that a legislative veto violates the bicameralism and presentment clause of Article I, section 7. Congress subsequently ratified all prior reorganizations. Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705. It then amended the Reorganization Act to require a joint resolution in support of any reorganization plan. Act of Nov. 8, 1984, Pub. L. No. 98-614, 98 Stat. 3192 (codified as amended at 5 U.S.C. §§ 901-912 (1994)). For a history of presidential reorganization powers, *see* Louis Fisher, ***The Legislatiue Veto: Invalidated, It Survives***, 56 LAW & CONTEMP. PROBS. 273, 277-86 (1993).

[5]Reorganization Plan No. 2 of 1978, 3 C.F.R. 323 (1978), *reprinted in* 5 U.S.C. app. at 1577 (1994), *and in* 92 Stat. 3783 (1978).

[6]The MSPB technically succeeded the CSC, but bears little resemblance in mission or organization. *Id.*

[7]Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended at scattered sections of 5 U.S.C.).

[8]Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 201, 92 Stat. 1111, 1119-21.

[9]*Id.* § 202, 92 Stat. 1121-31.

[10]The Lloyd-LaFollette Act first authorized federal employees to join unions, Act of Aug. 24, 1912, 37 Stat. 539, but executive orders prescribed labor-relations policy and administration prior to 1978. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963); Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970); *see generally* Michael R. McMillon, *Collective Bargaining in the Federal Sector: Has the Congressional Intent Been Fulfilled?*, 127 MIL. L. REV. 169, 176-88 (1990) (describing the pre-CSRA history of federal labor relations).

[11]Civil Service Reform Act of 1978, Pub. L. No. 95-454, §§ 701-704, 92 Stat. 1111, 1192-1216. Executive Order 11,491 spread primary enforcement and administration responsibilities among the Assistant Secretary of Labor for Labor-Management Relations and the Federal Labor Relations Council, which consisted of "the Chairman of the Civil Service Commission, who shall be chairman of the Council, the Secretary of Labor, an official of the Executive Ofice of the President, and such other officials of the Executive branch as the President may designate from time to time." Exec. Order No. 11,491, § 4, 3 C.F.R. 861 (1966-1970).

[12]Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1211-1213.

What inspired such dramatic change? President Carter established the Personnel Management Project in 1977 to undertake a comprehensive review of federal employment.[13] Nine task forces studied all aspects of the civil service, including personnel management organization and functions, employee disputes processes, labor relations, staffing, performance evaluation, pay and benefits, and employee development.14 Task force recommendations became the basis for President Carter's reorganization plans and his proposed reform legislation.[15]

Task force findings articulated concerns about the state of the federal civil service. Nixon Administration efforts to stack the career civil service with political allies had created doubts about the integrity of the merit system.[16] The CSC's responsibilities as the personnel policy arm of the executive branch undermined its credibility as an impartial adjudicator of employment disputes.[17] A "bewildering array of complex protective procedures" presented a burdensome obstacle for employees with legitimate claims while providing "refuge and protection [for] the incompetent and the problem employee."[18]

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[13]Letter from Dwight A. Ink to Alan K. Campbell and Wayne Granquist (Dec. 20, 1977), *in* 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT (Dec. 1977).

[14]2 PERSONNEL MANAGEMENT PROJECT, APPENDICES TO THE FINAL STAFF REPORT (Dec. 1977).

[15]SHIGEKI J. SUGIYAMA, PROTECTING THE INTEGRITY OF THE MERIT SYSTEM 17-18 (1985).

> [16][O]ne point was very much in the minds of senior personnel people and program managers at the time of the reform. That was the fact that we had recently emerged from the Watergate period during which the integrity of the career service was heavily undermined by a systematic political assault. The magnitude of that assault exceeded anything that we had seen in many years, and the full story of this has really never been told; the story, for example, about the extent to which the White House used "must hire" lists to force people on agencies. Their principal objective was the gaining of control over the career service, with agency personnel officers being bypassed and replaced for political reasons.

UNITED STATES GENERAL ACCOUNTING OFFICE, CIVIL SERVICE REFORM: DEVELOPMENT OF 1978 CIVIL SERVICE REFORM PROPOSALS 20 (1988) (remarks of Dwight Ink, Executive Director, Personnel Management Project) (transcript of a seminar held jointly by GAO and the Senate Governmental Affairs Subcommittee on Federal Services, Post Office, and Civil Service on March 31, 1988).

[17]2 PERSONNEL MANAGEMENT PROJECT, APPENDICES TO THE FINAL STAFF REPORT app. VIII at 1 (Dec. 1977). "The Civil Service Commission has in the past been lethargic in enforcing fair employment requirements within the Federal government." Message of the President to the Congress of the United States (Feb. 23, 1978), accompanying Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1574, 1575-76 (1994), *and in* 92 Stat. 3781 (1978) [hereinafter Message of the President].

[18]Letter from Dwight A. Ink to Alan K. Campbell and Wayne Granquist (Dec. 20, 1977), *in* 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT (Dec. 1977).

Reformers sought to eliminate organizational conflicts of interest, simplify procedures, expedite cases, enhance efficiency and accountability, and "[a]llow civil servants to be able to be hired and fired more easily, but for the right reasons."[19] As we approach the twentieth anniversary of these reforms, it is painfully apparent that they have not met expectations or goals.

Overlapping jurisdiction is more the rule than the exception for the potential combinations of the MSPB, the EEOC, the FLRA and the negotiated grievance procedure. Forum selection determines the relief and corrective action available and the scope of administrative and judicial review. Procedures are inconsistent and confusing, and delay infects administrative processes. Representatives from both labor and management express dissatisfaction with the status quo, albeit from different perspectives.[20]

The exit from this procedural quagmire is a return to basics via the intersection of the merit system and the civil rights laws. The **CSRA,** after all, considered civil rights part of the merit system:

> All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.[21]

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[19]S. REP. NO. 969, 95th Cong., 2d Sess. 2-4 (1978), reprinted *in* 1978 U.S.C.C.A.N.2723, 2724-26.

[20]*See, e.g.*, Streamlining Federal Appeals Procedures: Hearings Before the Subcomm. on Civil Service of the House Comm. on Government Reform and Oversight, 104th Cong., 1st Sess. (Nov. 29, 1995) [hereinafter Hearings] (statement of G. Jerry Shaw, General Counsel, Senior Executives Association) (federal employees have too many options, and they overuse them); Performance and *Accountability* in the Federal Sector: Hearings Before the Subcomm. on Civil Service of the House Comm. on Government Reform and Oversight 104th Cong., 1st Sess. (Oct. 26, 1995) (statement of Robert M. Tobias, National President, National Treasury Employees Union) (system problems are management's fault; one remedy is to make the negotiated grievance procedure exclusive for everything covered).

[21]Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 101, 92 Stat. 1111, 1114 (codified as amended at 5 U.S.C. § 2301(b)(2) (1994)). One of the enumerated prohibited personnel practices expressly incorporates the civil rights statutes applicable to federal employees:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority —
>
> (1) discriminate for or against any employee or applicant for employment —
>
> (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

Discrimination-free employment is a merit principle. The MSPB is the designated guardian of merit, yet the EEOC has jurisdiction over most federal employment discrimination complaints. Efforts to share and balance power between the EEOC and the MSPB have undermined one of the primary goals of reform, which was to create a fair, understandable, and responsive system for resolving employment disputes.[22]

Part II of this article describes the current organization and procedures for resolving federal employment disputes. This discussion illustrates the overlap, complexity, and delay designed into the present system. Part III traces the origins of this system and evaluates its performance in light of the concerns and policies that motivated reform efforts in 1978. The MSPB has been a success; it is fair, proficient, and efficient within its jurisdiction. On the other hand, the EEOC complaints process struggles to deal with the flood of federal-sector discrimination complaints[23] that bog down in the very procedures for which the reformers criticized the CSC. Artificial distinctions between discrimination complaints and other merit cases exacerbate the problem, with ill-advised jurisdictional boundaries creating the sort of complexity, overlap, and delay that inspired the 1978 reforms. Meanwhile, arbitrators, deciding the same types of cases as the MSPB and EEOC, operate with greater powers than administrative judges and administrative law judges (ALJ), and in certain cases enjoy unwarranted insulation from administrative and judicial review.

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

Id. § 101, 92 Stat. 1115 (codified as amended at 5 U.S.C. § 2302(b)(1) (1994)).

[22] *See infra* part III.A-D.

[23] Federal employees and applicants filed 24,592 discrimination complaints in fiscal year 1994, continuing a steady increase from 17,696 in fiscal year 1991. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 1. A survey by the Senior Executives Association found that federal employees and applicants filed discrimination complaints at a rate seven times greater than employees in the private sector during the period from 1982 to 1992. ***Hearings, supra*** note 20 (statement of Senior Executives Association General Counsel G. Jerry Shaw). This comparison may be misleading, however, because private-sector employees often have state or local remedies. *See* 42 U.S.C. § 2000e-5(c) (1988) (prescribing the enforcement relationship between the EEOC and state and local authorities).

Part IV proposes and explains specific measures to reshape the system to achieve the goals of fairness, simplicity, efficiency, and consistency. I propose to unify and simplify federal merit protection by strengthening the MSPB. My proposal transfers jurisdiction over federal-sector discrimination complaints from the EEOC to the MSPB; restructures the discrimination complaints process along the lines of MSPB appeal procedures; and adjusts the relationship between the MSPB and the negotiated grievance procedure. These measures create simple and logical paths of adjudication, administrative review, and judicial review. They eliminate the conflicts of interest and unnecessary delays present in the current discrimination complaints process. Finally, they preserve the role of collective bargaining in the federal work place while improving administrative review channels and providing a check on arbitrator powers.

II. A Jurisdictional Smorgasbord

A. *What Is a Federal Employee?*

"[T]he 'civil service' consists of all appointive positions in the executive, judicial, and legislative branches of the Government of the United States, except positions in the uniformed services."[24] Civil servants' substantive and procedural employment rights are creatures of statute.[25] Many of those statutes distinguish among employees by type of appointment, tenure status, and (occasionally) pay system. Others prescribe special rules for designated types of jobs that are excluded from the more general statutes.[26]

The *competitive service* consists of appointments in the executive branch that do not require Senate confirmation, are not in the Senior Executive Service (SES), and are not otherwise excluded from the competitive service by law or regulation.[27] Civil service

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[24] 5 U.S.C. § 2101 (1994). The uniformed services include the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration. *Id.*

[25] *See* Keim v. United States, 177 U.S. 290 (1900) (absent specific statute to the contrary, the absolute power to remove a federal employee is incident to the power of appointment).

[26] *See, e.g.*, Monser v. Department of the Army, 67 M.S.P.R. 477, 480 (1995) (Defense Department civilian intelligence employee lacked MSPB appeal rights over pay matters because appointed under 10 U.S.C. § 1590); Rivard v. Department of the Interior, 30 M.S.P.R. 311, 312-13 (1986) (Bureau of Indian Affairs school teacher lacked MSPB appeal rights on removal because Title 25 prescribes a unique personnel system); Cummings v. General Servs. Admin., 5 M.S.P.R. 47, 48-49 (1981) (National Archives Trust Fund employee had no MPSB appeal rights because enabling statute excluded the agency from various civil service laws and regulations).

[27] 5 U.S.C. § 2102 (1994). The competitive service also includes positions outside the executive branch that are specifically designated by statute as competitive service; statutorily designated positions that require Senate confirmation; and statutorily-designated positions in the government of the District of Columbia. *Id.*

appointments that are excluded from the competitive service and not included in the SES fall within the *excepted service*.[28] The SES is a small corps of high-level executives, for whom Senate confirmation is not required, who manage major organizations and programs within the executive branch.[29]

A competitive service employee must complete a one-year probation period in the same or similar positions to become a tenured career civil servant.[30] Excepted service employees never formally attain "career" status, but they acquire tenure for the purpose of certain appeal rights after one year if eligible for a veterans preference,[31] and two years otherwise.[32] Career appointees to the SES become permanent members after a one-year probation.[33]

The general schedule is the pay schedule with which the general public probably is most familiar. It is "a schedule of annual rates of basic pay, consisting of fifteen grades, designated 'GS-1' through 'GS-15', consecutively, with 10 rates of pay for each such grade."[34] The pay grade of a particular position depends on the level of difficulty and responsibility associated with its duties, and on the quali-

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[28] *Id.* § 2103.

[29] "Senior Executive Service position" means any position in an agency which is classified above GS-15 pursuant to section 5108 or in level IV or V of the Executive Schedule, or an equivalent position, which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which an employee

(A) directs the work of an organizational unit;

(B) is held accountable for the success of one or more specific programs or projects;

(C) monitors progress toward organizational goals and periodically evaluates and makes appropriate adjustments to such goals;

(D) supervises the work of employees other than personal assistants; or

(E) otherwise exercises important policy-making, policy-determining, or other executive functions; but does not include

(i) any position in the Foreign Service of the United States; or

(ii) or an administrative law judge position under section 3105 of [title 5].

Id. § 3132(a)(2).

[30] *Id.* § 3321; 5 C.F.R. § 315.801 (1995).

[31] *See* 5 U.S.C. § 2108 (1994).

[32] *See infra* part II.B.l.

[33] 5 U.S.C. § 3393(d) (1994).

[34] *Id.* § 5332(a)(2). The general schedule actually is an assembly of 27 pay schedules, one of general application and the others providing for higher wages in designated high-cost regions or localities. *See id.* §§ 5301-5307; Federal Employee Pay Comparability Act of 1990 § 302, incorporated as § 527 of Pub. L. No. 101-509, 104 Stat. 1389 (codified as amended at 5 U.S.C. §§ 5301-5307 (1994)); Exec. Order No. 12,736, 55 Fed. Reg. 51385 (1990).

fications that an employee must bring to that position.[35] An employee generally moves through the ten "steps" within a pay grade based on the amount of time in the position.[36]

The general schedule covers many, but not all, positions in the competitive and excepted services.[37] The Executive Schedule has five "levels" applicable to Senate-confirmed positions in the excepted service, ranging from cabinet officers to the general counsels of certain administrative agencies.38 Prevailing rate pay schedules cover skilled craftsmen, manual laborers, and other "blue collar" competitive service employees.[39] Specialized statutory pay systems apply to an assortment of other positions, such as certain health care professionals, civilian faculty at military service academies, the United States Postal Service, and employees of the Government Printing Office.[40]

The MSPB, EEOC, FLRA, and arbitrators all adjudicate civil service employment disputes.[41] The availability of a particular

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[35]5 U.S.C.§ **5102 (1994).**

[36]*Id.* § **5335.** An employee who has not received an equivalent pay increase during the applicable period, and has performed at "an acceptable level of competence as determined by the head of the agency," will receive a scheduled step increase. *Id.* Steps **1** through **3** require a year in grade before advancement to the next higher step; steps **4** through *6* require two years in grade; and steps **7** through 9 require three years in grade. *Id.*

[37]The Senior Executive Service has its own statutory pay system. ***See*** *id.* §§ 5382-5385.

[38]*See* ***id.*** §§ 5311-5318. Level I applies to the loftiest nonelected executive branch officials, such as the Secretary of State. *Id.* § **5312.** Level II covers the next tier of appointments, such as deputy cabinet secretaries and the secretaries of the military services. *Id.* § **5313.** The United States Solicitor General, the Under Secretaries of State, and the chairs of independent agencies, such as the MSPB, fall under Level III. *Id.* § **5314.** Other members of the MSPB are covered by Level IV. *Id.* **§ 5315.** The Assistant Attorney General for Administration is a Level V employee. *Id.* **§ 5316.**

[39]A prevailing rate employee is a federal employee "in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual, including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement." *Id.* § 5342(a)(2). Wage schedules for these employees are based on surveys of private-sector wages for the same or similar trades within designated regions. ***See id.*** § **5343;** 5 C.F.R. pt. **532** (1995).

[40]*See* **5** U.S.C. § 5102(c) **(1994).**

[41]The OPM decides classification appeals, which are substantively different from other employment disputes. This review process differs qualitatively from employment disputes before the MSPB, EEOC, and FLRA because the issue turns on administrative accuracy relative to a particular *position,* rather than on the rights of any particular ***employee.***

Classification is an administrative determination of the proper grade and job series for a particular position, regardless who holds that position. Agencies designate a class and pay grade for each position in the competitive and excepted civil service. *Id.* § **5107.** They place in the same class positions that "are sufficiently similar, as to—(A) kind or subject-matter of work; (B) level of difficulty and responsibility; and (C) the qualification requirements of the work; to warrant similar treatment in per-

forum depends on the employee's status,[42] the type of dispute involved, the existence and terms of any collective bargaining agreement, and whether any statute otherwise excludes the employee's position from a given forum's jurisdiction.[43]

B. *The* Merit Systems Protection Board

The MSPB has appellate jurisdiction over a broad range of employment disputes arising from personnel actions that employing agencies already have taken. Its original jurisdiction covers a narrower range of actions that generally are taken, if at all, only after the MSPB determines their propriety.

1. Appellate Jurisdiction — Although the nature of the dispute determines which appellate procedures apply to a particular case, certain general procedures provide a baseline. An individual with appeal rights files an appeal with the appropriate MSPB regional or field office.[44] That office assigns an administrative judge to conduct a hearing and render an initial decision on the merits.[45] The agency bears the burden of persuasion to justify its action, generally by preponderant evidence but other standards of proof apply in certain types of cases.[46] The administrative judge will award appropriate equitable relief[47] to a prevailing appellant, including back pay,[48] and will award attorney fees in the interests of justice.[49]

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sonnel and pay administration." *Id.* § 5102 (general schedule employees); *see also id.* § 5346 (OPM establishes and defines individual occupations and the boundaries of each occupation for prevailing rate positions). The pay grade (1-15) of a position within a class depends on the level of difficulty and responsibility associated with the duties, and on the qualifications that an employee must bring to that position. *Id.* § 5102 (general schedule employees); *Id.* § 5341 (prevailing rate employees).

Although classification implicates no rights personal to the employee, the incumbent in a general schedule position can request that the OPM review the accuracy of position's class and pay grade. 5 C.F.R. §§ 511.603 to 511.605 (1995). The employee appeals in writing, with supporting arguments, and the agency responds similarly. *Id.* § 511.606. The OPM determines the type and scope of fact finding that it will conduct, and can require the employee and agency to furnish relevant information. *Id.* § 511.609. Neither the employee nor the agency may appeal the final OPM decision. *Id.* § 511.612. A similar process applies to positions on a prevailing rate schedule. *See id.* §§ 532.701 to 532.707 (1995).

[42] "Status" concerns the type of appointment held, the pay system applicable, and whether the employee has acquired tenure for purposes of the particular forum.

[43] *See supra* note 26 and accompanying text.

[44] 5 U.S.C. §§ 7513(d), 7701(a) (1994); 5 C.F.R. § 1201.22 (1995). The regulations provide a complete list of MSPB offices at appendix II to 5 C.F.R., part 1201.

[45] 5 U.S.C. § 7701(b)(1) (1994); 5 C.F.R. §§ 1201.24, 1201.41, 1201.51-58, 1201.111 (1995).

[46] *See infra* notes 70, 73, 83, 88 and accompanying text.

[47] Equitable relief corrects the effects of the errant personnel action.

[48] 5 U.S.C. § 5596 (1994).

[49] The administrative judge must make an affirmative finding of whether the award of fees is in the interests of justice. *Id.* § 7701(g); *see* Allen v. United States Postal Service, 2 M.S.P.R. 420 (1980) (providing illustrative examples in which fees

The appellant and the agency have thirty-five days to petition the three-member Board for administrative review of the initial decision.[50] The OPM may intervene or independently petition for review when the administrative judge's erroneous decision would have a substantial impact on any civil service law, rule, or regulation under OPM jurisdiction.51 The Board reviews the administrative record de novo, but must "afford special deference to the [administrative judge's] findings respecting credibility where the [administrative judge] relies expressly or by necessary implication on the demeanor of the witnesses."[52]

Absent a timely petition for review, the initial decision becomes the MSPB's final decision.[53] The appellant may appeal a final decision to the United States Court of Appeals for the Federal Circuit.[54] The agency cannot appeal a final decision, but the OPM can where a Board error "in interpreting a civil service law, rule, or regulation affecting personnel management . . . will have a substantial impact on a civil service law, rule, regulation, or policy directive."[55] The Federal Circuit reviews the administrative record for whether the final decision was arbitrary, capricious, or an abuse of discretion.[56]

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would be warranted in the interests of justice). The interests of justice standard does not apply to whistleblower Individual Rights of Action. 5 U.S.C. § 1221 (1994); *see infra* notes 71-74. Title VII entitles a prevailing appellant to fees in a mixed case resulting in findings of unlawful discrimination. 42 U.S.C. § 2000e-5(k) (Supp. V 1993); *see* infra part II.E.

[50] 5 C.F.R. § 1201.113 (1995).

[51] 5 U.S.C. § 7701(e) (1994); 5 C.F.R. § 1201.114 (1995).

[52] Jackson v. Veterans Admin., 768 F.2d 1325, 1331 (Fed. Cir. 1985).

[53] 5 U.S.C. § 1201.113 (1994). An initial decision that becomes final without MSPB review is not precedential. Clark v. Department of the Army, 12 M.S.P.R. 428, 429 (1982).

[54] 5 U.S.C. § 7703 (1994).

[55] *Id.* § 7703(d). The OPM must first seek MSPB reconsideration if it did not previously intervene before the board. *Id.* The Federal Circuit has discretion to dismiss an OPM appeal if the court finds no substantial impact: "The granting of the petition for judicial review shall be at the discretion of the Court of Appeals." *Id.*; ***see,*** *e.g.,* Horner v. Garza, 832 F.2d 150 (Fed. Cir. 1987) (dismissing OPM petition for review of arbitration, for want of substantial impact).

[56] I use the phrase "arbitrary, capricious, or an abuse of discretion" throughout this paper to refer to the Federal Circuit's standard of review. The statute's language provides additional, redundant benchmarks for the standard of review:

> [T]he court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—
>
> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
>
> (3) unsupported by substantial evidence.

5 U.S.C. § 7703(c) (1994). Any decision properly characterized as not in accordance with law, contrary to required procedures, or unsupported by substantial evidence would by definition be either arbitrary or capricious, or reflect an abuse of discretion.

The United States Supreme Court has final review on a writ of certiorari.[57]

About half of all MSPB appeals involve Chapter 75 actions.[58] Chapter 75 of Title 5, U.S. Code prescribes due process[59] and appeal rights for certain employees[60] whom agencies remove (i.e., fire), suspend without pay for more than fourteen calendar days, reduce in grade,[61] or reduce in pay,[62] because of misconduct; or furlough[63] for thirty days or less." Although styled as an appeal, the administrative hearing is a trial de novo at which the agency generally bears the burden of persuasion.[65]

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[57]28 U.S.C. § 1254(1) (1994).

[58]*Hearings,* supranote 20 (statement of MSPB Chairman Benjamin Erdreich). Practitioners commonly refer to these cases as Adverse Actions, or True Adverse Actions. The moniker, 'Chapter 75 action," avoids confusion with other personnel actions, such as reductions in force (RIF) and performance-based removals or reductions. From the appellant's perspective, all of these actions are *adverse.*

[59]The disciplining agency generally must provide the employee with 30 days advanced written notice of a proposed Chapter 75 action. 5 U.S.C. § 7513(b)(1) (1994). The statute permits shorter notice where "there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed." *Id.* The employee has at least seven days to reply orally and in writing and to submit evidence, and may be represented by an attorney or other individual (such as a union official). *Id.* § 7513(b)(2)-(3). The agency must issue a prompt written decision stating the specific reasons for the discipline. *Id.* § 7513(b)(4).

Less severe discipline may entitle a competitive service employee to some degree of due process, but that process does not include an appeal to the MSPB. *See* id. §§ 7501-7504 (notice, reply, and representation rights for suspensions of 14 days or less).

[60]Competitive service and preferenceeligible excepted service employees gain appeal rights after a year of continuous service in the same or similar positions. *Id.* § 7511(a); *see also* id. § 2108 (veterans preference). Other excepted service employees acquire appeal rights after two years. *Id.* Some employees, such as political appointees in the excepted service, employees of the Central Intelligence Agency, and members of the Foreign Service, never gain appeal rights. *See id.* § 7511(b).

A career appointee in the SES who has completed a one-year probationary period can appeal a removal or suspension longer than 14 days if the agency based the action on misconduct, neglect, or malfeasance. *Id.* §§ 7541-7543.

[61]Reduction in grade refers to the pay grade on the applicable pay schedule. *See* supranotes 34-36 and accompanying text.

[62]This refers to a reduction of pay within the range for that pay grade on the applicable pay schedule. *See id.*

[63]"'[F]urlough' means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons." 5 U.S.C. § 7511(a)(5) (1994).

[64]*Id.* § 7512.

[65]In a discipline case, the agency must prove by preponderant evidence: (1) that the employee committed the misconduct; (2) the nexus between the misconduct and the efficiency of the civil service; and (3)the appropriateness of the penalty. *Id.* §§ 7701(c), 7513(a); Merritt v. Department of Justice, 6 M.S.P.R. 585 (1981). The employee may defeat the agency's case with preponderant evidence supporting an affirmative defense that the agency action involved harmful procedural error; was unlawful, or was motivated by a prohibited personnel practice. 5 U.S.C. § 7701(c)(2) (1994). "In order to show harmful error under the statute and the Board's regulations,

Chapter 43 of Title 5 U.S. Code, prescribes due process[66] and appeal rights for certain employees[67] whom agencies remove or reduce in grade because of unacceptable performance.[68] Chapter 43 actions accounted for about two percent of employee appeals to the MSPB in 1995.[69] The appeal is a trial de novo at which the agency bears a lower burden of persuasion than that for Chapter 75 actions, in recognition of the inherently subjective nature of performance evaluation.[70]

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an appellant must 'prove that any procedural errors substantially prejudiced his rights by possibly affecting the agency's decision."' Stephen v. Department of the Air Force, 47 M.S.P.R. 672, 681 (1991) (quoting Cornelius v. Nutt, 472 U.S. 648. 661 (1985)).

An administrative judge who affirms an agency's action on one or more charges reviews the penalty for abuse of discretion and will mitigate that penalty if it is "unreasonable under all the relevant circumstances." Douglas v. Veterans Admin.. 5 M.S.P.R. 280, 302 (1981) (articulating twelve considerations supporting a reasonable penalty); *but see* Baker v. Department of Health and Human Servs., 912 F.2d 1448, 1456 (Fed. Cir. 1990), where the court held, "We will defer to the agency's choice of penalty unless it is 'grossly disproportionate to the offense charged."' (citation omitted).

[66]An employee whose performance falls short of minimum standards is entitled to notice of the specific deficiencies, a reasonable opportunity to improve, and assistance toward that end. 5 C.F.R. § 432.104 (1995). The agency may remove or demote an employee who does not then improve to meet minimum standards, but only after a written 30-day notice, a reasonable opportunity for to respond orally and in writing, and a written agency decision detailing the reasons for the action. 5 U.S.C. § 4303 (1994).

Each agency must use a performance appraisal system that establishes "performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria . . . related to the job in question for each employee or position under the system." 5 U.S.C. § 4302 (19941. If an employee fails to meet the minimum performance standard for a "critical element" of the job, then that employee's overall performance is unacceptable. *See* 5 C.F.R. §§ 430.204, 432.103, 432.104 (1995).

[67]The probationary periods for Chapter 43 actions are the same as for Chapter 75 actions. 5 U.S.C. § 4303 (1994); *see supra* note *60*. As with Chapter 75, Foreign Service and other specified employees are excluded from the coverage of Chapter 43. 5 U.S.C. § 4301(2) (1994). Career SES employees have rights that fall under the MSPB's original jurisdiction. *See infra* text accompanying notes 113-15.

[68]5 U.S.C. § 4303 (1994).

[69]*Hearings*, supranote 20 (statement of MSPB Chairman Benjamin Erdreich).

[70]The agency must present *substantial* evidence that the employee's performance is unacceptable. 5 U.S.C. § 7701(c)(1)(A) (1994). Congress considered this lower standard appropriate for performance-based actions, because performance assessment entails matters within an agency's expertise, and performance issues are less "susceptible to the normal kind of evidentiary proof." S. REP. NO. 969, 95th Cong., 2d Sess. 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2776; *see also* Lisiecki v. Merit Sys. Protection Bd., 769 F.2d 1558, 1563-64 (Fed. Cir. 1985) (discussing the legislative history of Chapter 43).

The employee can raise the same affirmative defenses available in Chapter 75 actions. Unlike in Chapter 75 cases, however, the administrative judge and the Board have no power to review or mitigate the specific action taken in cases where the agency proves unacceptable performance. *Lisiecki*, 769 F.2d at 1565.

An individual who alleges retaliation for protected "whistleblowing"[71] may appeal to the MSPB via an Individual Right of Action (IRA) after exhausting administrative remedies with the Office of Special Counsel.[72] The agency faces a heavy burden of per-

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[71]Such retaliation is a prohibited personnel practice; the prohibition protects employees in, and applicants for, positions in the competitive service, excepted service, and career SES. 5 U.S.C. § 2302(a)(2)(B) (1994). The prohibition does not cover employees in, or applicants for, excepted service positions that are confidential, policy determining, policy making, or policy advocating in character. *Id.*

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
>
> . . .
>
> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant because of—
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
>
> (i) a violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Id. § 2302(b)(8).

> [P]ersonnel action means—
>
> (i) an appointment;
>
> (ii) a promotion;
>
> (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
>
> (iv) a detail, transfer, or reassignment;
>
> (v) a reinstatement
>
> (vi) a restoration;
>
> (vii) a reemployment;
>
> (viii) a performance evaluation under chapter 43 of this title;
>
> (ix) a decision concerning pay, benefits, or awards concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;
>
> (x) a decision to order psychiatric testing or examination; and
>
> (xi) any other significant change in duties, responsibilities, or working conditions; with respect to an employee in, or applicant for, a covered position in an agency.

Id. § 2302(a)(2).

[72]When the offending personnel action is not otherwise an appealable action, a prospective IRA appellant must seek assistance from the Office of Special Counsel (OSC). The OSC investigates allegations of prohibited personnel practices, including

suasion at the MSPB hearing on a whistleblower IRA,[73] and a prevailing appellant may recover "reasonable and foreseeable consequential damages"[74] in addition to equitable remedies and attorney fees. About two percent of MSPB appeals were IRAs in 1995.[75]

The MSPB has jurisdiction over appeals from most[76] nonproba-

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whistleblower reprisal, "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." Id. § 1213(a)(1)(A). The whistleblower can file an IRA when either of the following conditions is satisfied: (1)the OSC has not notified the whistleblower within 120 days of an intent to seek corrective action; or (2) no more than 60 days have elapsed since the OSC notified the whistleblower that it terminated the investigation. Id. §§ 1214(a)(3), 1221(a).

Alternatively, a protected whistleblower can raise the retaliation issue before the MSPB as an affirmative defense to a Chapter 75 action, a Chapter 43 action, or any other personnel action that is otherwise appealable to the MSPB. Id. § 1221(b).

[73]The whistleblower must show by preponderant evidence that the disclosure was protected and was a contributing factor to a decision about a personnel action affecting the whistleblower. *Id.* § 1221(e)(1). Congress recently made it easier for IRA appellants to meet this burden:

> The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—
>
> (A) the official taking the personnel action knew of the disclosure; and
>
> (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

Id.; see United States Office of Special Counsel, Merit Systems Protection Board: Authorization Act, Pub. L. No. 163-424, § 4, 108 Stat. 4361, 4363 (1994). If the whistleblower meets that burden, the administrative judge must order corrective action unless "the agency demonstrates by clear and Convincing *evidence* that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2) (1994) (emphasis added). "Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than 'preponderance of the evidence' as defined in 5 CFR 1201.56(c)(2)." 5 C.F.R. § 1209.4(d) (1995).

[74]5 U.S.C. § 1221(g) (1994). The MSPB and the courts have yet to determine the scope of "consequential damages," because these only recently became available. See United States Office of Special Counsel, Merit Systems Protection Board: Authorization Act, Pub. L. No. 163-424, § 8, 108 Stat. 4361, 4365 (1994). The scope is potentially quite broad. Consider, for example, Black's *Law* Dictionary's definition of consequential damages:

> Such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of the act. Damages which arise from intervention of special circumstances not ordinarily predictable. Those losses or injuries which are a result of an act but are not direct and immediate.

BLACK'S LAW DICTIONARY 390 (6th ed. 1990). The context of the statutory language, the principle that waivers of sovereign immunity are narrowly construed, and that MSPB appellants cannot otherwise recover taxable costs, however, weigh toward a more restrictive definition that merely covers direct out-of-pocket costs.

[75]*Hearings*, *supra* note 20 (statement of MSPB Chairman Benjamin Erdreich).

[76](a) Employees covered. Except as provided in paragraph (b) of this section, this part applies to each civilian employee in:

tionary employees affected by a **RIF** action.[77] The agency must prove by preponderant evidence that it followed applicable laws and regulation and that the **RIF** was for a proper reason.[79] Appeals from **RIF** actions accounted for about eighteen percent of MSPB appeals in 1995.[80]

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(1) The executive branch of the Federal Government; and

(2) Those parts of the Federal Government outside the executive branch which are subject by statute to competitive service requirements or are determined by the appropriate legislative or judicial administrative body to be covered hereunder. Coverage includes administrative law judges except as modified by Part **930** of this chapter.

(b) Employees excluded. This part does not apply to an employee:

(1) In a position in the Senior Executive Service; or

(2) Whose appointment is required by Congress to be confirmed by, or made with the advice and consent of, the United States Senate, except a postmaster.

5 C.F.R. § **351.202 (1995).**

Employees in collective bargaining units must use the negotiated grievance procedure, rather than appeal to the MSPB, unless the grievance procedure specifically excludes grievances over RIFs. **5** U.S.C. § 7121(a)(1) **(1994);5** C.F.R. § 1201.3(c) **(1995);** *cf.* Carter v. Gibbs, **909** F.2d **1452** (Fed. Cir.) (dismissing suit under Fair Labor Standards Act because the negotiated grievance procedure is the exclusive avenue of redress for matters within its scope, absent statutory exception), ***cert. denied*** *sub* ***nom.*** Carter v. Goldberg, **498** U.S. **811 (1990).**

A career SES employee also may appeal a RIF action, although different standards and procedures apply. ***See*** **5** U.S.C. § **3595 (1994);5** C.F.R. § 1201.3(a)(4) **(1995);** Kirk v. Office of Personnel Management, **23** M.S.P.R. **182 (1984)** (OPM statutorily required to take "all reasonable steps" to place affected SES employee with another agency).

[77]The MSPB has jurisdiction over actions appealable under "any law, rule, or regulation." **5** U.S.C. § 7701(a) **(1994).** Office of Personnel Management regulations make RIF actions appealable. **5** C.F.R. § **901 (1995).** An appealable RIF action is a furlough in excess of 30 days, a demotion, or a separation from the civil service, where the personnel action is necessary because (a) the agency lacks sufficient work to justify the staffing level; (b) the agency lacks funds to support its staffing level; (c) the agency's personnel ceiling requires a reduction in staffing level; the agency reorganizes; (d) another employee exercises reemployment rights or restoration rights; or (e) erosion of duties requires reclassification of an employee's position. ***Id.*** § 201(a).

[78]Markham v. Department of the Navy, **66** M.S.P.R. **559, 563 (1995)** (must follow OPM regulations); Robinson v. United States Postal Serv., **63** M.S.P.R. **307 (1994)** (postal reorganization cases); Kirk v. Office of Personnel Management, **23** M.S.P.R. **182 (1984)** (must follow statutory requirements for career appointees in SES). ***See*** ***also*** **5** C.F.R. pt. **351 (1995)** (OPM-prescribed procedures for RIFs); **5** U.S.C. § **3595 (1994)** (statutory requirements for RIFs of SES).

[79]Schroeder v. Department of Transportation, **60** M.S.P.R. **566, 569 (1994).**

[80]*Hearings*, supranote **20** (statement of MSPB Chairman Benjamin Erdreich). Reduction in force actions accounted for nine percent of appeals in **1994,** UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR **1994;** five percent in **1993,** UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR **1993;** eight percent in **1992,** UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR **1992;** eight percent in **1991,** UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR **1991;** and three percent in **1990,** UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR **1990.** The higher rate in recent years reflects the fruition of cases arising from extensive reorganization within the United States

A general schedule employee may appeal to the MSPB if the agency head denies a scheduled within-grade pay increase[81] because of the employee's performance.[82] As in Chapter 43 actions, the agency's burden of persuasion is lower than the general preponderance standard.[83] Denials of within-grade increases generated about one percent of appeals in 1995.[84]

Probationary employees have no statutory appeal rights, but OPM regulations[85] authorize them to appeal to the MSPB if terminated because of discrimination based on marital status or partisan politics,[86] or because of preappointment matters if the removal was procedurally defective.[87] The appellant, rather than the agency, bears the burden of persuasion.[88]

Postal Service. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, MERIT SYSTEMS PROTECTION BOARD—MISSION PERFORMANCE, EMPLOYEE PROTECTIONS, AND WORKING ENVIRONMENT (1995).

[81] *See* supranotes 34-36 and accompanying text.

[82] When a determination is made [by the head of the agency] that the work of an employee is not of an acceptable level of competence, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration of the determination within his agency under uniform procedures prescribed by the Office of Personnel Management. If the determination is affirmed on reconsideration, the employee is entitled to appeal to the Merit Systems Protection Board.

5 U.S.C. § 5335(c) (1994). "To be determined at an acceptable level of competence, the employee's most recent [performance evaluation] shall be at least Level 3 ("Fully Successful" or equivalent)."5 C.F.R. § 531.404 (19951.

Employees in collective bargaining units must use the negotiated grievance procedure, rather than appeal to the MSPB, to resolve the matter unless the grievance procedure specifically excludes disputes over the denial of a within-grade pay increase. *See infra* part II.F.l.

[83] The administrative judge (and the Board) must sustain the agency's decision if it is supported by substantial evidence.

> [T]he imposition of a higher evidentiary burden for withholding within-grade increases than for unacceptable performance discharges would be at least unreasonable if not absurd, and application of the substantial evidence standard is clearly more consonant with the policy of the legislation as a whole which is to ease or at least not to increase the evidentiary burden required to sustain performance-based actions.

Parker v. Defense Logistics Agency, 1 M.S.P.R. 505, 525 (1980).

[84] *Hearings*, supranote 20 (statement of MSPB Chairman Benjamin Erdreich).

[85] 5 C.F.R. § 315.806 (1995). *See also* 5 U.S.C. § 7701(a) (1994): "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation."

[86] Partisan politics means affiliation with any political party or candidate. Sweeting v. Department of Justice, 6 M.S.P.R. 715 (1981).

[87] A probationary employee removed for preappointment reasons is entitled to advance, written notice of the specific reasons for the proposed action; a reasonable opportunity to respond in writing; agency consideration of the response; and a written decision. 5 C.F.R. § 315.805 (1995).

[88] If a terminated probationer makes a nonfrivolous allegation discrimination based on marital status or political partisanship, and makes a factual showing suffi-

New managers and supervisors serve a probationary period even if they were tenured in their nonsupervisory or nonmanagerial position.[89] An employee who does not satisfactorily complete this probation is entitled to return to a position of no lower grade and pay than that held prior to becoming a manager or supervisor.[90] An employee who would have completed probation but for discrimination based on partisan political affiliation or marital status may appeal to the MSPB.[91]

The OPM administers federal laws regarding civil service retirement and disability benefits.[92] An individual[93] aggrieved by an OPM determination of rights or interests in such benefits may appeal that action to the MSPB.[94] The individual and the OPM are the parties, and the appellant must prove entitlement to the benefits by preponderant evidence.[95] Seventeen percent of MSPB appeals in 1995 involved retirement or disability issues.[96]

Finally, the MSPB has appellate jurisdiction over an assortment of other matters that accounted for about eight percent of initial appeals during fiscal year 1995,[97] and consisted of the following:

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cient to establish the MSPB's jurisdiction, then the agency must articulate a legitimate nondiscriminatory reason for the termination. The appellant then must prove by preponderant evidence that the agency's reason is mere pretext for discrimination. Stokes v. Federal Aviation Admin., 761 F.2d 682, 686 (Fed. Cir. 1985).

A probationer who appeals a removal for preappointment reasons must prove that the agency's failure to follow prescribed procedures constituted harmful error. Pope v. Department of the Navy, 62 M.S.P.R. 476 (1994). The merits of the decision to terminate the probationer are not at issue on appeal. "Rather, only the issue of whether the agency's failure to follow the procedures prescribed in 5 C.F.R. § 315.805 was harmful error is presented; if there was harmful error, the agency's action must be set aside." Keller v. Department of the Navy, 1996 WL 5853 (MSPB 1996).

[89] 5 U.S.C. 3321 (1994).

[90] *Id.*

[91] 5 C.F.R. § 351.908 (1995); see Kiser v. Department of Educ., 66 M.S.P.R. 372 (1995) (discussing the requisite showing to establish jurisdiction).

[92] 5 U.S.C. §§ 8347(a), 8461 (1994).

[93] This person may be an employee, a former employee, or some other beneficiary. See, *e.g.*, Cheeseman v. Office of Personnel Management, 791 F.2d 138, 141 (Fed. Cir. 1986) (surviving spouse), cert. denied, 479 U.S. 1037 (1987).

[94] 5 U.S.C. § 8347(d)(1) (1994).

[95] *Cheeseman*, 791 F.2d at 141. Although entitlement is a question of law, and the OPM has no discretion in awarding benefits, Oliveros v. Office of Personnel Management, 49 M.S.P.R. 360 (1991), the MSPB and reviewing courts defer to the OPM's interpretation of the civil service laws it administers "unless there are compelling indications that [the OPM] is wrong." Money v. Office of Personnel Management, 811 F.2d 1474 (Fed. Cir. 1987) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984); Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 381, (1969); American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986)).

[96] *Hearings*, supra note 20 (statement of MSPB Chairman Benjamin Erdreich).

[97] *Id.*

negative suitability determinations;[98] furloughs of career SES mem-

[98] 5 C.F.R. § 731.501 (1995). A suitability determination evaluates applicants, eligibles, and probationary appointees for whether their employment would serve the efficiency of the service.

(a) General. In determining whether its action will promote the efficiency of the service, OPM or an agency to which OPM has delegated authority under § 731.103 of this chapter, shall make it determination on the basis of:

(1) Whether the conduct of the individual may reasonably be expected to interfere with, or prevent, efficient service in the position applied for or employed in; or

(2) Whether the conduct of the individual may reasonably be expected to interfere with, or prevent, effective accomplishment by the employing agency of its duties or responsibilities; or

(3) Whether a statutory or regulatory bar prevents the lawful employment of the individual in the position in question.

(b) Specific factors. When making a determination under paragraph (a) of this section any of the following reasons may be considered a basis for finding an individual unsuitable:

(1) Misconduct or negligence in prior employment which would have a bearing on efficient service in the position in question, or would interfere with or prevent effective accomplishment by the employing agency of its duties and responsibilities;

(2) Criminal or dishonest conduct related to the duties to be assigned to the applicant or appointee, or to that person's service in the position or the service of other employees;

(3) Intentional false statement or deception or fraud in examination or appointment;

(4) Refusal to furnish testimony as required by § 5.4 of this chapter;

(5) Alcohol abuse of a nature and duration which suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of others;

(6) Illegal use of narcotics, drugs, or other controlled substances, without evidence of substantial rehabilitation;

(7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force;

(8) Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

(c) Additional considerations. In making a determination under paragraphs (a) and (b) of this section, OPM and agencies shall consider the following additional factors to the extent that they deem these factors pertinent to the individual case:

(1) The kind of position for which the person is applying or in which the person is employed, including the degree of public trust or risk in the position;

(2) The nature and seriousness of the conduct;

(3) The circumstances surrounding the conduct;

(4) The recency of the conduct;

(5) The age of the person involved at the time of the conduct;

(6) Contributing societal conditions;

(7) The absence or presence of rehabilitation or efforts toward rehabilitation.

Id. § 731.202.

bers;[99] return rights following military service or recovery from a compensable injury;[100] priority placement following a RIF or recovery from a compensable injury;[101] reinstatement following service under the Foreign Assistance Act of 1961;[102] re-employment rights following movement between agencies during an emergency,[103] detail or transfer to an international organization,[104] service under the Indian Self-Determination Act,[105] or service under the Taiwan Relations Act;[106] OPM applicant examination and evaluation practice ~removal of career SES members for failure to be recertified;[108] and RIFs affecting career or career candidate appointees in the Foreign Service.[109]

2. Original Jurisdiction — The foregoing matters were within the MSPB's appellate jurisdiction — appeals from agency actions already taken. The MSPB also has original jurisdiction in certain matters involving performance-based removal from the SES,[110] personnel actions against ALJs,[111] and Special Counsel prosecutions.[112] The party bringing an original jurisdiction case files directly with the Board, rather than with a regional or field office.

A nonprobationary, career SES employee who is notified of an impending performance-based removal from the SES may request an informal MSPB hearing,[113] but must do so at least fifteen days before the effective date of the removal.[114] Unlike other actions within the MSPB's jurisdiction, however, the hearing officer's determination on the merits is not subject to administrative or judicial review.[115]

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[99] *Id.* § 359.805.

[100] *Id.* § 353.401.

[101] *Id.* §§ 301.501, 330.202.

[102] *Id.* § 352.508.

[103] *Id.* § 352.209.

[104] *Id.* § 352.313.

[105] *Id.* § 352.70.

[106] *Id.* § 352.807.

[107] *Id.* § 300.14.

[108] 5 U.S.C. § 3592(a)(3) (1994); 5 C.F.R. § 359.304 (1995).

[109] 22 U.S.C. $4011 (1994).

[110] 5 U.S.C. § 3592 (1994); 5 C.F.R. § 1201.2(b) (1995).

[111] 5 U.S.C. § 7521 (1994); 5 C.F.R. § 1201(c) (1995).

[112] 5 U.S.C. §§ 1214-1216 (1994); 5 C.F.R. § 1201.2(a) (1995).

[113] *See, e.g.*, Gaines v. Department of Housing and Urban Dev., 14 M.S.P.R. 473 (1983) (informal hearing referred to Board's Chief Administrative Law Judge). Career SES employees have no appeal rights under Chapter 43. 5 U.S.C. § 4301 (1994).

[114] 5 U.S.C. § 3592(a) (1994); 5 C.F.R. § 359.502(b) (1995). The agency must place the employee in a non-SES position. 5 U.S.C. § 3592(a) (1994).

[115] "[S]uch hearing shall not give the career appointee the right to initiate an action with the Board under section 7701 of this title. . . ." 5 U.S.C. § 3592(a) (1994).

The Administrative Procedure Act[116] created the position of ALJ to perform certain agency adjudications.[117] The Act granted ALJs limited insulation from agency control by vesting responsibility for ALJ tenure and compensation decisions in the OPM,[118] by exempting ALJs from performance ratings,[119] and by authorizing their discipline or removal only for good cause found by the MSPB after an opportunity for a hearing.[120] In contrast, administrative judges are excepted service, general schedule employees of their employing agencies, with little of the independence that ALJs enjoy.

An agency seeking to discipline of one of its ALJs files a complaint with the MSPB, which assigns the matter to the Chief ALJ unless the Board decides to hear the case directly.[121] The Chief AW holds a hearing using standard MSPB hearing procedures[122] and issues a recommended decision that becomes the final MSPB decision absent timely exceptions by the agency or the respondent ALJ.[123] The Board determines the penalty de novo if it finds good cause to impose discipline.[124] Judicial review lies initially in the Court of Appeals for the Federal Circuit,[125] and ultimately in the United States Supreme Court on a writ of certiorari.[126]

The last area of MSPB original jurisdiction involves another independent agency, the Office of Special Counsel (OSC).

C. *The Office of Special Counsel*

The OSC originally was the investigative and prosecutorial arm of the MSPB;[127] it became an independent agency with the passage of the Whistleblower Protection Act of 1989.[128] The OSC's mis-

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[116]Pub. L. No. 79-404, 60 Stat. 237-44 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305,3105,3344,5372, 7521 (1994)).

[117]"Each agency shall appoint as many administrative law judges as are necessary for proceedings required to **be** conducted in accordance with sections 556 and 557 of this title." 5 U.S.C. § 3105 (1994).

[118]*Id.* § 5372.

[119]*Id.* § 4301.

[120]These requirements apply to removal, suspension, reduction in grade, reduction in pay, or a furlough of 30 days or less. *Id.* § 7521(a).

[121]5 C.F.R. § 1201.134 (1995).

[122]*See supra* part **I.B.1.**

[123]5 U.S.C. § 557 (1994);5 C.F.R. § 1201.135 (1995).

[124]Department of Commerce v. Dolan, 39 M.S.P.R. 314, 317 (1988) (agency recommendations receive no deference).

[125]5 U.S.C. § 7703(b) (1994).

[126]28 U.S.C. 9 1254(1) (1994).

[127]Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202, 92 Stat. 1111, 1122-1131.

[128]Pub. L. No. 101-12, 103 Stat. 16

sion is to investigate alleged prohibited personnel practices[129] and

[129]In addition to unlawful employment discrimination. *see supra* note 21, and retaliation against protected whistleblowers, *see also supra* note 71, the following are prohibited personnel practices:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action except as provided under section 3303(f);

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in

bring corrective[130] and disciplinary[131] actions before the MSPB as warranted; to interpret and enforce the Hatch Act provisions on political activity;[132] and to provide a "secure channel through which federal employees may make disclosures of information evidencing violations of law, rule or regulation, gross waste of funds, gross mismanagement, abuse of authority, or a substantial and specific danger to public health or safety, without disclosure of the employee's identity (except with the employee's consent) and without fear of retaliation."[133]

The OSC assigns top priority to allegations of whistleblower retaliation,[134] and generally defers to the EEOC in discrimination cases.[135] It must investigate allegations of prohibited personnel practices "to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice

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section 2301 of this title.

5 U.S.C. § 2302 (1994).

[130] *See* 5 U.S.C. § 1214 (1994). Corrective action is remedial for the affected employee, and includes relief such as back pay and restoration of benefits lost because of a prohibited personnel practice. "The Board shall order such corrective action as the Board considers appropriate. . . ." *Id.* § 1214(b)(4)(A).

[131] *See id.* § 1215; see *also* ***supra*** notes 149-54 and accompanying text.

[132] (a) **An** employee may not engage in political activity—

(1) while the employee is on duty;

(2) in any room or building occupied in the discharge of official duties by an individual employed or holding office in the Government of the United States or any agency or instrumentality thereof;

(3) while wearing a uniform or official insignia identifying the office or position of the employee; or

(4) using any vehicle owned or leased by the Government of the United States or any agency or instrumentality thereof.

5 U.S.C. § 7324 (1994). In 1993, Congress lifted restrictions that had prohibited employees from influencing elections or participating in campaigns. Pub. L. No. 103-94, 107 Stat. 1003 (1993).

[133] UNITED STATES OFFICE OF SPECIAL COUNSEL, ANNUAL REPORT FROM THE OFFICE OF SPECIAL COUNSEL FOR FISCAL YEAR 1994 at 2. An employee can reveal to the OSC even matters the disclosure of which is classified or otherwise specifically prohibited by law. 5 U.S.C. § 2302(b)(8)(B) (1994). This ombudsman role is limited to investigation, reporting, and monitoring. *Id.* § 1213. The OSC can initiate related litigation as a corrective or disciplinary action. 5 U.S.C. §§ 1214-1215 (1995).

[134] *See* ***supra*** note 71.

[135] UNITED STATES OFFICE OF SPECIAL COUNSEL, ANNUAL REPORT FROM THE OFFICE OF SPECIAL COUNSEL FOR FISCAL YEAR 1994 at 3 (whistleblower priority); 5 C.F.R. § 1810 (1995)(deferral policy). Sexual harassment cases are an exception to the deferral policy, as are those involving egregious harassment and those for which the EEO process appears to be inadequate; the OSC retains the prerogative to monitor the **EEO** process in a given case. Bruce D. Fong, EEO and the United States Ofice of Special Counsel, Presentation to the Federal EEO Practitioners Forum (Mar. 3, 1995); see, *e.g.*, Special Counsel **v.** Russell, 32 M.S.P.R. 115 (1987)(OSC disciplinary action against an alleged perpetrator of sexual harassment).

has occurred, exists, or is to be taken."[136] When the OSC finds such reasonable grounds, it reports the findings and recommendations to the MSPB, the OPM, and the agency involved.[137]

The OSC may initiate a *Corrective action* by filing a complaint with the MSPB against an agency that does not correct the problem within a reasonable period.[138] The respondent agency files a written answer,[139] and the MSPB may order either party to file briefs or memoranda.[140] The Board normally will not order a hearing, but both parties and the OPM are entitled to comment orally or in writing, and alleged victims of the prohibited personnel practice may submit written comments.[141] The Board will order corrective action if the OSC shows by preponderant evidence that a prohibited personnel practice (other than reprisal for protected whistleblowing) "has occurred, exists, or is to be taken."[142]

In whistleblower reprisal cases, the OSC need only demonstrate that the protected disclosure was a contributing factor[143] to the personnel action.[144] The MSPB then will order corrective action unless the agency demonstrates by clear and convincing evidence[145] that it would have taken the disputed personnel action even absent

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[136]5 U.S.C. § 1213(a)(1)(A) (1994).

[137]*Id.* § 1214(b)(2)(A).

[138]*Id.* § 1214(b)(2)(B).

[139]5 C.F.R. § 1201.125 (1995).

[140]*Id.* § 1201.123.

[141]5 U.S.C. § 1214(b)(3) (1994); 5 C.F.R. §§ 1201.124, 1201.126 (1995).

[142]5 U.S.C. § 1214(b)(4)(A) (1994).

[143]"[T]he 'contributing factor' standard is a lower standard than the 'substantial factor' standard that was in effect in whistleblower cases before the Whistleblower Protection Act became law." Gergick v. General Servs. Admin., 43 M.S.P.R. 651 (1990) (citation omitted). "Contributing factor means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure." 5 C.F.R. § 1209.4(c) (1995).

Recent legislation created a presumption that the disclosure was a contributing factor when the official taking action knew of the disclosure and took the action within a period such that a reasonable person could infer the connection. United States Office of Special Counsel, Merit Systems Protection Board: Authorization Act, Pub. L. No. 163-424, § 4, 108 Stat. 4361, 4363 (1994); ***see supra*** note 73. This legislation, however, amended the burden only for the IRA appellant. 5 U.S.C. § 1221(e)(1) (1994). The Act contained no similar provision applicable to OSC corrective actions. Nevertheless, the OSC considers the amendment applicable to corrective actions as well. *See* UNITED STATES OFFICE OF SPECIAL COUNSEL, ANNUAL REPORT FROM THE OFFICE OF SPECIAL COUNSEL FOR FISCAL YEAR 1994 at 21.

[144]5 U.S.C. § 1214(b)(4)(B) (1994); 5 C.F.R. § 1201.126(b)(1) (1995).

[145]"Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than 'preponderance of the evidence' as defined in 5 CFR 1201.56(c)(2)." 5 C.F.R. § 1209.4(d) (1995).

the protected disclosure.[146] The OSC cannot obtain judicial review of the MSPB decision in a corrective action,[147] but the victim of the alleged prohibited personnel practice may appeal an adverse decision to the United States Court of Appeals for the Federal Circuit.[148]

The OSC can initiate a *disciplinary action* by filing a complaint with the MSPB against an employee[149] who the OSC finds has committed a prohibited personnel practice, engaged in prohibited political activity, wrongfully withheld information from the OSC, or wrongfully failed to comply with an order of the MSPB.[150] The respondent employee is entitled to a hearing before the Board or an ALJ, and a written Board decision.[151] Where the OSC proves the allegation by preponderant evidence,[152] the MSPB fashions a penalty from options that include removal, reduction in grade, debarment from federal employment for five years, suspension, reprimand, and civil penalties up to $1000.[153] The respondent employee may appeal to the Federal Circuit.[154]

D. The Equal Employment Opportunity Commission

Unlike the MSPB, which has very limited jurisdiction, the EEOC has jurisdiction over complaints from a broad range of employees and applicants for employment. Just about every executive branch employee or applicant has access to the federal discrimination complaints process, including employees of nonappropriated fund instrumentalities and government corporations such as the

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[146] 5 U.S.C. § 1214(b)(4)(B) (1994). The burdens of persuasion are such that, from a practical standpoint, the agency is pushing uphill in any case where there was a protected disclosure and agency knowledge of that disclosure.

[147] *See* 5 U.S.C. § 7703 (1994).

[148] *Id.* § 1214(c).

[149] The agency is not a party to a disciplinary action.

[150] 5 U.S.C. §§ 1215(a), 1216(a) (1994). *See, e.g.*, Special Counsel v. Russell, 32 M.S.P.R. 115 (1987) (prohibited personnel practice — sexual harassment); Special Counsel v. Rivera, 61 M.S.P.R. 440 (1994) (Hatch Act violation). A search of the WESTLAW MSPB database disclosed no reported cases of discipline for knowingly and willfully refusing or failing to comply with an order of the MSPB.

[151] 5 U.S.C. § 1215(a)(2) (1994); 5 C.F.R. § 1201.124(b) (1995).

[152] In contrast to corrective actions, the Special Counsel does not enjoy a lower standard of proof in cases alleging whistleblower retaliation. The OSC must prove by a preponderance of the evidence that the protected disclosure was a *significant* factor in the prohibited personnel action. Eidmann v. Merit Sys. Protection Bd., 976 F.3d 1400, 1405 (Fed. Cir. 1992). The OSC, therefore, might prevail in a corrective action against an agency based on the retaliatory actions of one of its officials, but fail to meet its burden in a disciplinary action against the employee because the protected disclosure was a contributing factor but not a significant factor in the personnel action.

[153] 5 U.S.C. § 1215(a)(3) (1994).

[154] *Id.* § 7703.

Federal Insurance Deposit Corporation.[155] Coverage extends further to positions in the United States Postal Service and Postal Rate Commission, the Government Printing Office, the General Accounting Office, and the Library of Congress; and to competitive service positions in the judicial branch and in the government of the District of Columbia.[156]

An individual may complain of discrimination based on Title VII of the Civil Rights Act of 1964[157] (race, color, religion, sex, national origin); the Age Discrimination in Employment Act[158] (age forty or over); the Rehabilitation Act of 1973[159] (disability); or the

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[155](a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), . . .

42 U.S.C. § 2000e-16 (1988). "The military departments are: The Department of the Army. The Department of the Navy. The Department of the Air Force." 5 U.S.C. § 102 (1994). "For purposes of this title, 'Executive agency' means an Executive department, a Government corporation, and an independent establishment." *Id.* § 105.

[156]42 U.S.C. § 2000e-16(a) (1988). Congress extended the protection of federal discrimination laws to its other employees in 1995. See Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3 (to be codified at 2 U.S.C. §§ 1301-1438). Counseling and mediation are the first two stages of the complaints process for congressional employees. The employees then may elect an administrative process or a civil action in United States district court. The administrative process includes a hearing, administrative review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit. *Id.* § 401.

[157]*See id.* (sources cited).

[158]*See* 29 U.S.C. § 633a (1994).

[159]*See id.* §§ 791-797. Section 501 of the Rehabilitation Act (29 U.S.C. § 791) requires federal agencies to design and implement affirmative action programs for individuals with disabilities. Section 504 (29 U.S.C. § 794) directs that "no otherwise qualified individual with a disability shall, solely by reason of his or her disability be excluded from participating in, denied benefits of, or subjected to discrimination under any ***program or*** actiuity conducted by an executive agency." *Id.* § 794 (emphasis added). Some early courts relied on section 504 as a basis for prohibiting disability discrimination by federal agencies. ***See, e.g.***, Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981). Congress muddied the waters in 1978 by adding section 504a (29 U.S.C. § 794a), which makes Title VII rights, remedies, and procedures available with respect to a complaint under section 501, even though section 501 mentions nothing about a cause of action. Amendments in 1989 appear to have ruled out section 504 as the basis of a federal employee's complaint: section 504(b) now defines ***program*** *or* activity as a nonfederal entity receiving federal funds. 29 U.S.C. § 791(b) (1994).

The Civil Rights Act of 1991 filled the hole in section 501 by referencing EEOC regulations:

> In an action brought by a complaining party under the powers, remedies, and procedures set forth in section . . . 717 of the Civil Rights Act of 1964 [42 U.S.C.A. §§ 2000e-16] (as provided in . . . section 794a(a)(1) of

Equal Pay Act (sex-based wage discrimination).[160] Congress authorized the EEOC to craft the administrative process by which to handle such complaints.[161]

1. *The Administrative* Process—The first stop in the EEOC administrative complaints process is the equal employment opportunity (EEO) counselor, who works for the agency that allegedly discriminated and performs the counseling function either full time or as a collateral duty.[162] Counselors normally are not attorneys, and they have widely varying degrees of training and expertise in employment discrimination law.

The counseling process resolves most discrimination cases before a formal complaint is ever filed. The counselor meets with the complainant to explain the complaints process and identify issues; meets with witnesses and gathers information; and attempts to resolve the employment dispute at the lowest level possible.[163] Statistics indicate a good, but declining, success rate. From 1984 through 1991, about eighty percent of employees who contacted EEO counselors chose *not* to file formal complaints. That rate dropped to

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> Title 29 . . .) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29 and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation . . . may recover compensatory . . . damages . . . .

42 U.S.C. § 1981a(a)(2) (Supp. V 1993). While hardly a model of clarity, this statutory patchwork ensures that federal employees have a cause of action under section 501 of the Rehabilitation Act.

[160] *See* 29 U.S.C. § 206(d) (1994) (as amended by the Fair Labor Standards Amendments of 1974). The Title VII prohibition of sex discrimination covers any matter that would form the basis of a complaint under the Equal Pay Act.

> [161] Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

42 U.S.C. § 2000e-16(b) (1988).

[162] During fiscal year 1994, more than 89% of EEO counselors performed this function as a collateral duty; 6.3% were full-time counselors; another 3.54 were full-time counselor/investigators; and less than 1% were part-time employees who performed counseling duties exclusively or along with investigative duties. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 17.

[163] *See* UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R.—PART 1614, EEO MD-110, ch. 2 (1992).

seventy-seven percent in fiscal year 1992, sixty-seven percent in fiscal year 1993, and sixty-three percent in fiscal year 1994.[164]

The complainant generally must contact an EEO counselor within forty-five days of the discriminatory act or the effective date of a discriminatory personnel action.[165] The counselor then has thirty days to complete counseling[166] unless the complainant agrees to an extension of up to sixty days,[167] or the agency and the individual agree to pursue an alternative dispute resolution procedure.[168] The counselor provides the complainant a "notice of final interview" at the end of the counseling period, following which the complainant may file a formal discrimination complaint within fifteen days.[169]

The respondent agency determines whether to accept or dismiss the complaint. It *shall* dismiss when the complaint fails to state a claim on which relief can be granted; the complaint states a claim already pending before the **EEOC,** or that has already been decided by the EEOC; the complainant fails to meet any of the deadlines (for example, counselor contact within forty-five days, formal complaint within fifteen days of notice of final interview); or the claim is moot or not yet ripe.[170]

The complainant may appeal to the **EEOC** within thirty days of the agency's dismissal of part or all of the complaint.[171] Any statement or brief in support of the appeal is due thirty days after filing

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[164]*See Hearings, supra* note 20 (statement of EEOC Chairman Gilbert F. Casellas). This precipitous decline began during fiscal year 1991, coincident with the amendment of Title VII and the Rehabilitation Act that authorized jury trials and compensatory damages. *See* 42 U.S.C. § 1981a (Supp. V 19931. Happenstance is an unlikely explanation for the timing of these events, although the extent of the relationship is debatable.

[165]29 C.F.R. § 1614.105(a)(1) (1995). The regulations provide relief from the deadline

> when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she should not have been [sic] known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

Id. § 1614.105(a)(2).

[166]*Id.* § 1614.105(d).

[167]*Id.* § 1614.105(e).

[168]Diversion to an alternative dispute resolution mechanism extends the counseling period to 90 days. *Id.* § 1614.105(f).

[169]*Id.* § 1614.106.

[170]*Id.* § 1614.107.

[171]*Id.* §§ 1614.401(a), 1614.402. The Office of Federal Operations receives and decides appeals on behalf of the Commission. Id. §§ 1614.404, 1614.405.

the appeal.[172] The respondent agency then has thirty days to forward the complaint file to the EEOC along with any agency statement or brief in opposition.[173] The EEOC reviews the record and any supplemental information it may request from the parties, and determines whether the agency should have accepted the complaint.[174]

The process moves to the investigation stage if the agency accepts the complaint or loses the appeal from a dismissal. The agency investigates the complaint, developing "a complete and impartial factual record upon which to make findings on the matters raised by the written complaint."[175] The agency must complete the investigation within 180 days from the date the complainant files the formal complaint, or from the date that the EEOC orders acceptance of the complaint, unless the parties agree to an extension of up to ninety days.[176]

The agency forwards a copy of the completed investigation to the complainant, who then has thirty days to request either a hearing before an EEOC administrative judge or a final agency decision without a hearing.[177] The agency head makes the decision based on the administrative record if the complainant elects a final agency decision without a hearing. The complainant then has thirty days to appeal to the EEOC if the agency head finds no discrimination, or grants less than all the relief requested.[178]

If the complainant requests a hearing, the EEOC regional office assigns an administrative judge who then permits discovery, holds a closed hearing, issues findings of fact and conclusions of law on the merits of the complaint, and "order[s] appropriate relief where discrimination is found with regard to the matter that gave

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[172] *Id.* § 1614.403(d).

[173] *Id.*

[174] *Id.* §§ 1614.404, 1614.405.

[175] *Id.* § 1614.108.

[176] *Id.* § 1614.108(e).

[177] *Id.* § 1614.108(f). Agencies completed 14,399 investigations in fiscal year 1994, and complainants requested 10,712 hearings. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 45, T-24. The fiscal year 1994 cases from which complainants requested hearings are not a precise subset of the fiscal year 1994 cases for which agencies completed investigations, because the complainant has 30 days to consider the report of investigation before requesting a hearing or a final agency decision without a hearing. ***See*** 29 C.F.R. § 1614.108(f) (1995). These figures suggest, however, that complainants request a hearing nearly 75% of the time.

[178] 29 C.F.R. § 1614.401 (1995). The filing deadlines, and opportunities to file supporting briefs and memoranda, are as discussed in the context of an appeal from the agency dismissal of a complaint. ***See supra*** notes 171-74 and accompanying text.

rise to the complaint."[179] The administrative judge's decision, however, is merely a recommendation to the agency. The agency head has sixty days to issue a final agency decision adopting, rejecting, or modifying the administrative judge's decision.[180] A disappointed complainant may appeal the final agency decision to the EEOC.[181]

2. Remedies—The EEOC can award "appropriate remedies, including reinstatement or hiring of employees with or without back pay."[182] Potentially appropriate remedies include declaratory and injunctive relief, retroactive personnel actions, expungement or correction of records, back pay,[183] front pay,[184] restoration of leave, and other equitable relief.[185] Title VII and Rehabilitation Act claimants may recover attorney and expert fees for the administrative

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[179]29 C.F.R. § 1614.109 (1995). The complainant has the burden of persuasion to prove intentional discrimination by preponderant evidence. The Complainant may establish a prima facia case by demonstrating membership in a protected class under Title VII, the Rehabilitation Act, or the Age Discrimination in Employment Act; that the complainant suffered an employment-related harm; and that other individuals not belonging to that protected class were treated differently. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The prima facie case creates a presumption of intentional discrimination, *id.*, but the agency can erase the presumption by articulating a legitimate nondiscriminatory reason for the action at issue. *Id.;* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). The employee may prevail, however, with preponderant evidence that the agency's articulated reason was mere pretext for discrimination. *Id.*

[180]29 C.F.R. §§ 1614.109(g), 1614.110 (1995). Agencies accepted only 41.2% of recommended decisions that included findings of discrimination in fiscal year 1994. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at T-36. They accepted 83.1% of recommended decisions that found no discrimination, modified another 16.3%, and rejected only .7%. *Id.*

[181]29 C.F.R. §§ 1614.401-1614.407 (1995). The administrative process is far from complete even at this stage. The complainant has 30 days to file a brief in support of the appeal, following which the agency has 30 days to file a brief in opposition. *Id.* § 1614.403(d). The EEOC took an average of 185 days to decide appeals during fiscal year 1994. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 63. The complainant can request reconsideration within 30 days of an appellate decision finding no discrimination. 29 C.F.R. § 1614.407 (1995). The complainant runs out of administrative remedies only on denial of the request for reconsideration.

[182]42 U.S.C. 5 2000e-16(b) (1988). The agency head also may grant such relief pursuant to the final agency decision.

[183]Back pay recovery is limited to two years prior to the date of filing the formal complaint. See 42 U.S.C.A. § 2000e- 5(b) (1988).

[184]A "front pay" award is appropriate when it is not practical to place the complainant in the same or substantially equivalent position that the complainant would have held but for the discrimination. The complainant's duty to mitigate is built into this equitable award. *See* Shore v. Federal Express Corp., 42 F.3d 373 (6th Cir. 1994).

[185]42 U.S.C. § 2000e-5(g),(k) (Supp. V 1993).

process;[186] the ADEA does not specifically provide for attorney fees, but claimants may be able to recover under the Back Pay Act.[187]

The Civil Rights Act of 1991 authorized compensatory damages of up to $300,000 for federal district court plaintiffs in Title VII and Rehabilitation Act cases.[188] The EEOC has held that these damages are available through the administrative process as well.[189] Administrative judges, however, find only whether damages are appropriate; the agency head determines the appropriate amount.[190] Compensatory damages are not available to victims of age discrimination.[191]

3. Judicial Review—The agency is bound by the EEOC's final order,[192] but a disappointed complainant is entitled to a trial de novo in United States district court.[193] The plaintiff in a Title VII or Rehabilitation Act civil action who seeks compensatory damages may elect to have a jury determine liability and damages, although equitable relief remains the province of the judge.[194] ADEA plaintiffs present their cases at bench trials.[195]

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[186]29 U.S.C. § 794a (1994); 42 U.S.C. § 2000e-5(k) (Supp. V 1993).

[187]*See* 5 U.S.C. § 5596 (1994). The Back Pay Act authorizes attorney fees to employees who prevail at an administrative hearing regarding an unwarranted or unjustified personnel action that resulted in the loss of pay, if the award of such fees is in the interests of justice. *Id.* §§ 5596(b)(1)(A)(ii), 7701(g).

[188]42 U.S.C. § 1981a (Supp. V 1993).

[189]Jackson v. Runyon, 01923399 (EEOC 1992), *aff'd*, 05930306 (EEOC 1993).

[190]Memorandum from James H. Troy, Director, Office of Program Operations, EEOC, to District Directors and Administrative Judges (Oct. 6, 1993).

[191]*See* 29 U.S.C. § 633a (1994); 42 U.S.C. § 1981a (Supp. V 1993).

[192]Moore v. Devine, 780 F.2d 1559, 1562-63 (11th Cir. 1986) (final decisions of EEOC binding on agency but not on complainant).

[193]Within 90 days of receipt of notice of final action taken by [the respondent agency], or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such [respondent agency] on a complaint of discrimination based on race, color, religion, sex or national origin . . . or after 180 days from the filing of the initial charge with the [respondent agency], until such time as final action may be taken by [the respondent agency], an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the [respondent agency] shall be the defendant.

42 U.S.C. § 2000e-16(c) (Supp. V 1993). ***See*** Chandler v. Roudebush, 425 U.S. 840 (1976) (civil action is a trial de novo). A complainant who prevails before the EEOC can limit the scope of the civil action to the remedy, preserving the underlying finding of discrimination. Haskins v. Department of the Army, 808 F.2d 1192, 1199 & n.4 (6th Cir.), cert. *denied*, 484 U.S. 815 (1987); Pecker v. Heckler, 801 F.2d 709, 711 n.3 (4th Cir. 1986); Moore v. Devine, 780 F.2d 1559, 1562 (11th Cir. 1986).

[194]42 U.S.C. § 1981a (Supp. V 1993).

[195]*See* 29 U.S.C. § 633a (1994); 42 U.S.C. § 1981a (Supp. V 1993).

A complainant typically has several opportunities to elect between continuing to pursue administrative remedies and filing a civil action: during the ninety-day period after an EEOC order affirming the agency's dismissal of all or part of the formal complaint; after 180 days from filing the formal complaint, if the agency has not yet issued a final agency decision and no appeals remain pending; during the ninety-day period following the final agency decision; during the ninety-day period following the EEOC's decision on the appeal of a final agency decision; and after 180 days from filing an appeal to the EEOC if the EEOC has not yet rendered a final decision.[196] Age discrimination complaints enjoy even greater flexibility: the complainant may file a civil action after providing the EEOC thirty days notice of intent to sue, any time within 180 days of the alleged discriminatory event.[197]

4. Class Complaints—A group of employees, former employees, or applicants for employment who believe they are aggrieved by a discriminatory agency personnel policy or practice[198] may choose to file a class complaint, analogous to a civil class action.[199] A class agent first must comply with the counseling requirements applicable to individual complaints.[200] The agent then may file the complaint within fifteen days of receiving a notice of the right to do so.[201] The complaint must identify a discriminatory policy or practice affecting the proposed class.[202]

The agency forwards the complaint to the EEOC, which assigns an administrative judge to review the complaint and recommend acceptance or dismissal. The administrative judge may recommend dismissal for one of the reasons applicable to individual complaints (such as failure to state a claim upon which relief can be granted, mootness) or because the complaint does not satisfy the criteria for certification of the class: numerosity of complainants such that joinder is impracticable; questions of fact common to the class; the class agent's claim typical of the class; and the class agent or his representation will adequately protect the interests of the entire class.[203]

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[196] 29 C.F.R. § 1614.408 (1995).

[197] 29 U.S.C. § 633a (1994). See *also* 29 C.F.R. 1614.201 (1995) (administrative exhaustion in age discrimination cases).

[198] 42 U.S.C. § 633a(c)-(d) (1988); 29 C.F.R. § 1614.204(a) (1995).

[199] *See* FED. R. CIV. P. 23.

[200] 29 C.F.R. § 1614.204(b) (1995).

[201] *Id.* § 1614.204(c)(2).

[202] *Id.* § 1614.204(c)(1)-(2).

[203] *Id.* § 1614.204(d)(2).

The respondent agency has thirty days to accept, reject, or modify the administrative judge's recommendation.[204] The class agent may appeal the agency decision to the EEOC under appellate procedures applicable to individual complaints.[205] An agency that accepts a class complaint, either on the administrative judge's recommendation or on remand from an appeal to the EEOC, must notify the members of the class.[206] The parties then conduct discovery and, barring settlement,[207] litigate the merits at a hearing.[208] The administrative judge reports findings and recommendations to the agency head.[209]

The agency head has sixty days to issue a final agency decision that accepts, rejects, or modifies the administrative judge's recommended decision on the merits of the class complaint.[210] The class agent may appeal the final agency decision to the EEOC.[211] A final finding of class-wide discrimination obligates the agency to discontinue the discriminatory policy or practice and provide individual relief to the class agent, including attorney fees.[212] Equal Employment Opportunity Commission regulations prescribe special procedures for other class members to claim individual relief.[213] The regulations also permit the resurrection of individual complaints that were subsumed by a class complaint, if the class complaint led to a finding of individual discrimination against the class agent but not class-wide discrimination.214

The agent may file a class action in federal district court within ninety days of a final agency decision, if the class does not appeal to the EEOC; within ninety days of a final order of the EEOC on appeal; after 180 days from the date of filing the complaint, if the agency has not issued a final agency decision; or after 180 days from an appeal to the EEOC for which the EEOC has not rendered a final decision.[215]

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[204] *Id.* § 1614.204(d)(7).

[205] ***See supra*** notes 171-74 and accompanying text.

[206] 29 C.F.R. § 1614.204(e) (1995).

[207] Special notification requirements apply to the settlement of class complaints. ***See*** 5 C.F.R. § 1614.204(g) (1995).

[208] 29 C.F.R. § 1614.204(h) (1995).

[209] *Id.* § 1614.204(h)-(i).

[210] *Id.* § 1614.204(j).

[211] *Id.* § 1614.401(b).

[212] *Id.* § 1614.204(l)(1).

[213] *Id.* § 1614.204(l)(3).

[214] *Id.* § 1614.204(l)(2).

[215] 42 U.S.C. § 2000e-16(c) **(Supp.** V 1993);29 C.F.R. § 1614.408 (1995).

E. Mixed Cases

The discussion thus far has ignored cases in which an employee with MSPB appeal rights alleges that unlawful discrimination motivated an appealable personnel action. The special procedures that apply to these mixed cases have been a magnet for criticism, for reasons that will become all-too apparent. The first of myriad forks in the procedural road is the employee's choice between following the agency complaints process (mixed complaint) and appealing directly to the MSPB (mixed appeal).

1. Mixed Complaints—If the employee elects the discrimination complaints process, the EEOC procedures described above apply through the point of completing the agency investigation.[216] A mixed case complainant, however, has no right to a hearing before an EEOC administrative judge.[217] The agency issues a final agency decision, following which the complainant may either appeal to the MSPB or sue in United States district court.[218]

Where the complainant appeals the final agency decision to the MSPB, an administrative judge conducts a hearing on both the civil service and the discrimination aspects of the case[219] and issues a decision within 120 days from the date the complainant filed the appeal.[220] The administrative judge may award any relief that would be available from the MSPB or the EEOC, including compensatory damages where appropriate.[221]

2. Mixed Appeals—A mixed case appellant bypasses the discrimination complaints process in favor of direct filing with the MSPB.[222] As with mixed complaints, an MSPB administrative judge holds a hearing, issues an initial decision, and awards appropriate relief.

3. Administrative Review—The parties have thirty-five days to petition the MSPB for review of the administrative judge's initial

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[216] *See supra* part II.D.1.

[217] 5 C.F.R. § 7702(a)(2) (1995).

[218] 5 U.S.C. § 7702(a)(2) (1994); 42 U.S.C. § 2000e-16(c) (Supp. V 1993). *See infra* part I.E.4.

[219] 5 U.S.C. § 7702(a)(1)-(2) (1994); see *supra* notes 179-81 and accompanying text (hearing procedures).

[220] 5 U.S.C. § 7702(a) (1994). The administrative judge can remand a discrimination issue to the respondent agency in specified circumstances. *See* 5 C.F.R. § 1201.155 (1995). The initial decision then is due 120 days after the agency completes action on remand. *Id*. § 1201.156(c).

[221] Hocker v. Department of Transportation, 63 M.S.P.R. 497, 505 (1994). The MSPB administrative judge, unlike EEOC administrative judges, determines the specific amount of any damages. *Id*.

[222] 5 U.S.C. § 7702(a)(1) (1994); 5 C.F.R. §§ 1201.151 to 1201.157 (1995).

decision.[223] The OPM can petition if an erroneous decision will have a substantial impact on any civil service law, rule, or regulation under OPM jurisdiction.[224] The final decision binds the agency and the OPM.

The employee has thirty days after receiving the MSPB final decision to petition the EEOC for review.[225] On granting a petition for review, the EEOC considers the entire administrative record and either (1) concurs with the MSPB decision; or (2) issues another decision that differs with that of the MSPB because either the MSPB misinterpreted a discrimination law, or the evidence of record does not support an MSPB decision involving a discrimination law.[226]

Equal Employment Opportunity Commission concurrence with the MSPB final decision marks the completion of administrative review, and the EEOC notifies the complainant of the right to file a civil action.[227] The case returns to the MSPB, however, if the EEOC disagrees with the Board.[228] The MSPB can either join the EEOC position or it can disagree and send the case to the Special Panel.[229] The Special Panel consists of an EEOC commissioner, a member of the MSPB, and a Chair appointed by the President with the advice and consent of the Senate.[230] The parties may present oral and written argument.[231] The Special Panel makes the final administrative decision.[232]

4. Judicial Review—The final administrative decision, whether it be from the MSPB, the EEOC, or the Special Panel, binds the agency and the OPM.[233] The employee, however, has numerous

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[223]5 C.F.R.§§ 1201.113, 1201.152 (1995).

[224]5 U.S.C. § 7701(e) (1994). Discrimination laws, however, are not civil service laws within the meaning of sections 7701 or 7703. King v. Lynch, 21 F.3d 1084 (Fed. Cir. 1994).

[225]5 U.S.C. § 7702(b) (1994). The initial decision becomes the final decision absent a timely petition for review. 5 C.F.R. § 1201.113(1995).

[226]5 U.S.C. § 7702(b)(3) (1994).

[227]*Id.* § 7702(b)(5)(A).

[228]*Id.* § 772(b)(5)(B).

[229]*Id.* § 7702(c)-(d).

[230]*Id.* § 7702(d)(6).

[231]*Id.* § 7703(d)(4).

[232]*Id.* § 7703(d)(2). "The special panel shall refer its decision . . . to the Board and the Board shall order any agency to take any action appropriate to carry out the decision." *Id.* § 7703(d)(3).

[233]If the final decision found no discrimination, but held for the complainant on the civil service issue, the OPM technically could appeal the civil service issue to the Court of Appeals for the Federal Circuit if an erroneous interpretation of civil service law, rule, or regulation would have a substantial impact on a civil service law, rule, regulation, or policy directive. *Id.* § 7703(d). On the other hand, the employee could

opportunities to file a civil action for a trial de novo in United States district court: (a) 120 days after filing a discrimination complaint with the agency, if the agency head has not by then issued a final agency decision;[234] (b) within ninety days of receiving a final agency decision;[235] (c) 120 days after filing an appeal to the MSPB, if the MSPB has not by then issued a final decision;[236] (d) within ninety days of receiving an MSPB final decision;[237] (e) 180 days after filing a petition with the EEOC to review the MSPB decision, if the EEOC or MSPB or Special Panel have not by then issued a final decision;[238] (f) within ninety days of receiving the EEOC's concurrence with an MSPB final decision, on petition for review;[239] (g) within ninety days of receiving the MSPB's concurrence with an EEOC decision on remand from a granted petition for review;[240] or (h) within ninety days of a Special Panel decision.[241]

The district court judge will review the MSPB or Special Panel decision on the civil service issues for whether the decision was arbitrary, capricious, or an abuse of discretion.[242] The plaintiff is entitled to a trial de novo on the merits of the discrimination issue, with the same rights and remedies as available to plaintiffs arriving in court via the EEOC process.[243] Although the district courts have exclusive jurisdiction over mixed cases, the Federal Circuit will review the civil service issues if the employee expressly abandons the discrimination claim.[244]

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pursue the discrimination issue in United States district court. If both the OPM and the complainant were to appeal the separate prongs of the case at the same time, the Federal Circuit presumably would transfer the civil service appeal to the district court for review. *Cf.* Williams v. Department of the Army, 715 F.2d 1486 (Fed. Cir. 1983) (employee could not bifurcate appeal by pursuing civil service issue in Court of Claims and discrimination issue in district court). No reported cases have passed on this scenario. *Cf.* King v. Lynch, 21 F.3d 1084, 1088-89 (Fed. Cir. 1994) (pointing to the carefully-crafted review scheme for mixed cases as evidence that the OPM cannot appeal erroneous interpretations of discrimination laws).

[234] 5 U.S.C. § 7702(e)(1)(A) (1994).

[235] 42 U.S.C. § 2000e-16(c) (Supp. V 1993).

[236] 5 U.S.C. § 7702(e)(1)(B) (1994).

[237] *Id.* § 7702(a)(3).

[238] *Id.* § 7702(e)(1)(C).

[239] *Id.* § 7702(b)(5)(A).

[240] *Id.* § 7702(c).

[241] *Id.* § 7702(d)(2).

[242] *Id.* § 7703(b)-(c); Morales v. Merit Sys. Protection Bd., 932 F.2d 800, 802 (9th Cir. 1991); Romain v. Shear, 799 F.2d 1416 (9th Cir. 1986), cert. ***denied,*** 481 U.S. 1050 (1987). If the plaintiff filed the suit prior to obtaining a final decision from the **MSPB,** then the civil service issue would not be judicially reviewable. See 5 U.S.C. § 7703(a) (1994).

[243] 42 U.S.C. § 2000e-16(c) (Supp. V 1993); Chandler v. Roudebush, 425 U.S. 840 (1976). See supra part II.D.4 regarding the availability of a jury trial and compensatory damages and other remedies.

[244] Davidson v. United States Postal Serv., 24 F.3d 223 (Fed. Cir. 1994); Daniels v. United States Postal Serv., 776 F.2d 723 (Fed. Cir. 1984).

F. The Negotiated Grievance Procedure

Labor unions represent about sixty percent of federal employe e ~When an agency recognizes a union as the exclusive representative of a collective bargaining unit of agency employees,[246] the parties (agency and union) negotiate a collective bargaining agreement.[247] Every collective bargaining agreement must include a negotiated grievance procedure that, with certain exceptions, is the sole avenue for resolving grievances[248] not excluded from its coverage.[249]

The negotiated grievance procedure must authorize the agency and the union to invoke binding arbitration as the final step of any grievance.[250] **An** individual bargaining unit employee, however, has no power to invoke arbitration. This section describes the procedures for four categories of employee grievances: those for which the negotiated grievance procedure is the exclusive remedy; discrimination cases for which the employee may elect either the negotiated grievance procedure or the EEOC procedure; Chapters **43** and **75** cases for which the employee may elect the negotiated grievance procedure or the MSPB procedure, and mixed cases.

1. The Negotiated Grievance Procedure as the Exclusive Remedy — A negotiated grievance procedure preempts MSPB appel-

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[245] VICE PRESIDENT AL GORE, CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: REPORT OF THE NATIONAL PERFORMANCE REVIEW 87 (1993). Unions represent about 80% of those employees who are not excluded from collective bargaining by statute or executive order. *Id.*

[246] *See* 5 U.S.C. § 7111 (1994).

[247] *See id.* § 7117.

[248] A grievance is any complaint

> **(A)** by any employee concerning any matter relating to the employment of the employee;
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> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee, labor organization, or agency concerning—
>
> (i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
>
> (ii) any claimed violation, misinterpretation, **or** misapplication of any law, rule, or regulation affecting conditions of employment.

Id. § 7103(a)(9).

[249] *Id.* § 7121(a). The parties (management and the union), bargain over the scope of the negotiated grievance procedure, and can agree to expressly exclude particular matters from coverage. Disputes involving the following are statutorily excluded from the negotiated grievance procedure's coverage: (1) prohibited political activities; (2) retirement, life insurance, or health insurance; (3) suspension or removal for national security reasons; (4) an examination, certification, or appointment; and (5) a classification of any position which does not result in the reduction in grade or pay of an employee. *Id.* § 7121(c).

[250] *Id.* § 7121(b)(3)(C).

late jurisdiction over matters other than Chapters 43 and 75 actions, discrimination cases, and whistleblower IRAs, if the negotiated grievance procedure does not exclude the particular type of dispute from its coverage.[251] A bargaining unit employee who otherwise could appeal to the MSPB regarding the denial of a within-grade pay increase, for example, must use the negotiated grievance procedure if it does not exclude such grievances from its coverage.

The grievant cannot obtain review of the agency decision unless the union invokes arbitration. Where the union invokes arbitration, the parties present the matter to a private arbitrator selected in accordance with the negotiated grievance procedure. Either party may file exceptions within thirty days of the arbitrator's decision.[252] The Federal Labor Relations Authority has jurisdiction over these exceptions, and will affirm the arbitrator unless "the award is deficient—(1) because it is contrary to any law, rule, or regulation; or (2) on other grounds similar to those applied by federal courts in private sector labor-management relations."[253] The FLRA decision on exceptions is final and not subject to judicial review unless the case involves an unfair labor practice.[254]

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[251] *Id.* § 7121; 5 C.F.R. § 1201.3(b)-(c) (1995).

[252] 5 U.S.C. § 7122(b) (1994).

[253] *Id.* § 7122(a). The following constitute "grounds similar": the arbitrator exceeded her authority by deciding an issue not presented; the award does not draw its essence from the collective bargaining agreement (Naval Mine Warfare Eng'g Activity and National Ass'n of Gov't Employees, 39 F.L.R.A. 1207 (1991)); the award is impossible to implement because it is incomplete, ambiguous, or contradictory (Delaware Nat'l Guard and Association of Civilian Technicians, 5 F.L.R.A. 50 (1981)); the award was based on a gross mistake of fact that changed the result (Redstone Arsenal and American Fed'n of Gov't Employees, 18 F.L.R.A. 374 (1985));the arbitrator was biased or partial, (Department of the Air Force, Hill Air Force Base and American Fed'n of Gov't Employees, 39 F.L.R.A. 103 (1991)); and the arbitrator refused to consider pertinent and material evidence (*id.*).

[254] 5 U.S.C. § 7123(a) (1994). Management commits an unfair labor practice by interfering with an employee's exercise of his or her rights under the labor relations statute; by providing unlawful assistance to another union; by refusing to bargain in good faith with the recognized union; by refusing to cooperate in required impasse-resolution procedures; or by otherwise violating the labor relations statute. *Id.* § 7116(a). The union commits an unfair labor practice by failing to fairly represent a covered employee, by interfering with any employee's exercise of rights under the labor relations statute, or retaliating against that employee therefor; by causing management to unlawfully discriminate against an employee; by refusing to bargain in good faith; by refusing to cooperate in required impasse-resolution procedures; by calling for or participating in a strike or other job action; by picketing in such a manner as to interfere with agency operations; or by otherwise violating the labor relations statute. *Id.* § 7116(b). Most arbitration awards will not implicate an unfair labor practice that would render the FLRA decision judicially reviewable.

The agency must comply with an arbitration award that the FLRA has affirmed; failure to do so is an unfair labor practice. *Id.* § 7116(a)(5) (refusal to bargain in good faith). The FLRA adjudicates unfair labor practice cases through its own administrative litigation process. *See id.* § 7118; 5 C.F.R. pt. 2423 (1995). The agency cannot relitigate the merits of an underlying arbitration award as a defense to an

2. *Discrimination* Grievances—An employee alleging unlawful discrimination may choose between the negotiated grievance procedure and the EEOC process unless the negotiated grievance procedure excludes discrimination complaints.[255] The employee elects the EEOC process by contacting the agency EEO counselor; filing a written grievance constitutes election of the negotiated grievance procedure.[256] The election is binding.[257]

An employee who elects the negotiated grievance procedure follows the grievance procedure through all the steps up to arbitration. If the union refuses to invoke arbitration, the grievant may appeal the agency decision to the EEOC,[258] which will review the administrative record as it would review any final agency decision. The grievant may bring a civil action in federal district court within ninety days of receiving the EEOC's final decision on appeal.[259]

The grievant may appeal an arbitration decision to the EEOC.[260] The union and the agency may file exceptions with the FLRA.[261] The FLRA decision binds the agency, but the grievant may appeal that decision to the EEOC.[262] The grievant also enjoys the opportunity to file a civil action at almost every juncture in the process.

3. Chapters *43* and 75 Grievances—An employee with appeal rights may elect between the MSPB appellate process and the negotiated grievance procedure to contest a Chapter **43** or 75 action,[263] unless the negotiated grievance procedure excludes these matters from its coverage.[264] Review jurisdiction for Chapters **43** and 75 grievances lies with the Court of Appeals for the Federal Circuit; the MSPB has no jurisdiction.[265]

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unfair labor practice charge, either before the FLRA or the United States courts of appeals on judicial review. ***See*** Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988) (merits of arbitration awards appealed to FLRA are not further reviewable in any federal court unless arbitrator's decision and the FLRA's affirmance is challenged as unconstitutional or falls within the narrow bounds of Leedom v. Kyne, 358 U.S. 184 (1958)); Department of Justice v. FLRA, 792 F.2d 25 (2d Cir. 1986).

[255] 5 U.S.C. § 7121(d) (1994).

[256] *Id.* § 7121(d).

[257] *Id.*

[258] *Id.* § 7121(d); 29 C.F.R. § 1614.401(c) (1995).

[259] 42 U.S.C. § 2000e-16(c) (Supp. V 1993); 29 C.F.R. § 1614.408(c) (1995).

[260] 5 U.S.C. § 7121(d) (1994); 29 C.F.R. § 1614.401(c) (1995).

[261] 5 U.S.C. § 7122 (1994).

[262] *Id.* § 7121(d); 29 C.F.R. § 1614.401(c) (1995).

[263] *See **supra*** notes 58-70 and accompanying text.

[264] 5 U.S.C. § 7121(e) (1994).

[265] *Id.* § 7121(f).

The Federal Circuit reviews the arbitrator's decision "in the same manner and under the same conditions as if the matter had been decided by the Board."[266] The agency, therefore, cannot appeal an arbitration decision even if it is based on an erroneous interpretation of law. The OPM can appeal in a substantial impact case,[267] but the Federal Circuit has discretion to dismiss if it considers the impact insubstantial.[268] The agency can then be left with implementing an unlawful remedy.[269]

4. Mixed Grievances—Suppose the agency imposes a Chapter 43 or 75 action on an employee who has MSPB appeal rights, and the employee wishes to raise an affirmative defense of unlawful discrimination via the negotiated grievance procedure. The mixed grievance is the third corner of the mixed case Bermuda triangle. The employee may file a mixed grievance (if the negotiated grievance procedure does not exclude mixed cases), a mixed complaint, or a mixed appeal.[270]

A disappointed grievant cannot obtain MSPB review if the union does not invoke arbitration,[271] but may abandon the civil service issue and appeal the agency decision on the discrimination claim to the EEOC.[272] The grievant may follow the EEOC appeal

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[266] *Id.* The standard of review, therefore, is whether the arbitrator's decision was arbitrary, capricious, or an abuse of discretion. *Id.* § 7703(c). The court will consider the traditional labor law policy of deference to arbitrators' decisions, *see* Devine v. Brisco, 733 F.2d 867, 871 (Fed. Cir. 1984); but recognizes that "[j]udicial deference to an arbitral award may be inappropriate when the award is in apparent conflict with a federal statute that is distinct from the operation of the collective bargaining unit." Devine v. Nutt, 718 F.2d 1048, 1053 (Fed. Cir. 19831, *reu'd on other grounds sub nom.* Cornelius v. Nutt, 472 U.S. 648 (1985).

[267] *See supra* note 55 and accompanying text.

[268] *See* 5 U.S.C. § 7703(d) (1994) ("The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.").

[269] *See* Horner v. Garza, 832 F.2d 151 (Fed. Cir. 1987). The court referred to the arbitrator's decision as "*ultra vires* and unenforceable," but failed to grasp that the agency has no other forum in which to challenge the enforceability. *Id.* at 151. The FLRA has no jurisdiction to hear exceptions. 5 U.S.C. § 7122(a) (1994). The agency commits an unfair labor practice if it fails to implement the arbitration award. *Id.* § 7116(a)(5). It cannot relitigate the merits of the arbitration award in its defense of the unfair labor practice charge before the FLRA or a United States court of appeals. *See supra* note 254 and accompanying text.

[270] 5 U.S.C. § 7121(d) (1994).

[271] Mawson v. Department of the Navy, 48 M.S.P.R. 318,322 (1991) ("[T]he final decision rendered pursuant to a negotiated grievance procedure, which is then appealable to the Board under 5 U.S.C. § 7121(d) (1994), is the arbitrator's decision in cases where the grievance procedure provides for arbitration as a last resort."). Every negotiated grievance procedure provides for arbitration as a last resort. 5 U.S.C. § 7121(a) (1994).

[272] 29 C.F.R. § 1614.401(c) (1994).

with a trial de novo in United States district court on the merits of the discrimination issue.[273]

Neither the agency nor the OPM can obtain administrative or judicial review of an arbitrator's decision on a mixed grievance. The grievant may appeal to the MSPB, which will review the decision for whether the arbitrator erred in interpreting a civil service law, rule, or regulation.[274] The grievant may appeal to the EEOC if not satisfied with the MSPB decision, triggering the back-and-forth process that leads ultimately to the Special Panel.[275] A civil action in United States district court is an option at various stages following the arbitration decision.[276]

5. Other Prohibited Personnel *Practices*—The alleged victim of a prohibited personnel practice, other than discrimination, in a case other than a Chapter **43** or 75 action, may pursue the matter through the negotiated grievance procedure or the OSC.[277] The FLRA has jurisdiction to review exceptions from arbitration awards.[278] The FLRA decision generally is not judicially reviewable.[279]

111. The Roots, Successes, and Flaws of the 1978 Civil Service Reforms

The flow charts in Appendix **A** generally depict the various administrative processes for resolving federal-sector employment disputes; they reveal a process that can be incomprehensible to practitioners, let alone the average federal employee with no legal training. This part examines how and why that system arose, and evaluates how well or poorly the system serves the objectives that prompted reform in 1978.

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[273]42 U.S.C. § 2000e-16(c) (Supp. V 1993); 29 C.F.R. § 1614.408(c)-(d) (19951. The agency cannot appeal the EEOC decision.

[274]Robinson v. Department of Health and Human Servs., 30 M.S.P.R. 389 (1986). The term "civil service" apparently includes, for the purposes of appeals under **5** U.S.C. § 7121(d), discrimination laws. "[T]he Board will decide both discrimination issues and other appealable issues in conducting its limited scope of review of arbitration decisions under *5* U.S.C. § 7121(d)." ***Id.*** at 398.

[275]5 U.S.C. § 7121(d) (1994). ***See*** *supra* part II.E.3.

[276]*See supra* part I.E.4.

[277]5 U.S.C. § 7121(g) (1994). **A** whistleblower has the further option to bring an IRA upon exhaustion of administrative remedies with the OSC. ***See*** *supra* notes 71-74 and accompanying text.

[278]5 U.S.C. § 7122 (1994).

[279]Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988).

A. *The Civil Service Comnzission*

The Pendleton Act of 1883[280] created the CSC to implement a merit system for hiring federal civil servants, and to eliminate the political spoils system. The CSC's responsibilities expanded over time to include implementing standards and procedures for removal, position classification, supervision of efficiency ratings, and retirement matters, moving "beyond patronage control to modern personnel administration in the Federal Government."[281] Executive order 9830 charged the CSC with exercising and providing "leadership in personnel matters throughout the Federal service."[282]

By 1978, the CSC's responsibilities extended to virtually all aspects of personnel management, including merit staffing (hiring, promoting, removing); performance evaluation; pay and benefits; retirement and health insurance; labor-management relations; and equal employment opportunity and affirmative action.[283] The CSC was a policy maker, a management consultant, a merit protector, and an adjudicator of employment disputes. Its performance as the master personnel agency, however, came under scrutiny.

A CSC evaluation team reviewing personnel management operations in a regional office of the General Services Administration in 1973 received allegations of political patronage in the hiring process.[284] The subsequent inquiry revealed abuses that could occur only with the complicity of officials in the CSC's Bureau of Recruiting and Examining.[285]

> To counter these assaults, there ha[d] gradually developed a bewildering array of complex protective procedures and additional checks and balances. Complexity ha[d] also been increased through procedural safeguards for various disadvantaged groups where rights ha[d] been too long ignored. The resultant time-consuming and confusing red tape undermine[d] confidence in the merit system. . . .
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> Ironically, the entangling web of safeguards spun over the years often fail[ed] to protect against major political assaults and cronyism.[286]

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[280] Civil Service Act of 1883, 22 Stat. 403.

[281] S. REP. No. 969, 95th Cong., 2d Sess. 5 (1978), ***reprinted in*** 1978 U.S.C.C.A.N. 2723,2727.

[282] Exec. Order No. 9830, 12 Fed. Reg. 1259 (1947).

[283] *See* 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT (Dec. 1977).

[284] *See* SHIGEKI, ***supra*** note 15, at 3.

[285] *Id.* at 8-12.

[286] Letter from Dwight A. Ink to Alan K. Campbell and Wayne Granquist (Dec. 20,19771, ***in*** 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT (Dec. 1977).

These bewildering procedures, the confusing red tape, and the CSC's structural conflict of interest and resulting pro-management bias attracted the attention of a new presidential administration.

B. The Personnel Management Project

President Carter assigned his new CSC Chairman to chair the Personnel Management Project (Personnel Management Project), which began on May 27, 1977.[287] The Personnel Management Project charter was to examine current personnel policies, processes, and organization for areas of improvement, and to recommend necessary changes to achieve that improvement.[288] Nine task forces, comprised primarily of career federal employees, investigated and reported on every aspect of the civil service system.[289] The task force reports and the final staff report became the foundation for Reorganization Plan Numbers 1 and 2, and for the Civil Service Reform Act. Two task forces addressed federal-sector employment litigation directly.

1. Equal *Employment* Opportunity — Task Force 4 (Equal Employment Opportunity and Affirmative Action) confronted widespread criticism of the discrimination complaints process as "biased against complainants; . . . too lengthy, repetitive, complex, and confusing; and . . . without protection for the rights of those who had been accused or named as alleged discriminating officials."[290] Other criticisms included that federal complainants' rights were inferior to those of private-sector complainants;[291] inflexible, restrictive proce-

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[287] SHIGEKI, ***supra*** note 15, at 13.

[288] *Id.*

[289] The nine task forces were: (1) Composition and Dynamics of the Federal Workforce; (2) Senior Executive Service; (3) Staffing Process: Entry to and Departure from the Civil Service; (4) Equal Employment Opportunity and Affirmative Action; (5) Job Evaluation, Pay, and Benefit Systems; (6) Labor-Management Relations; (7) Development of Employees, Supervisors, Managers, and Executives; (8) Roles, Functions, and Organization for Personnel Management; and (9) Federal, State, and Local Interaction in Personnel Management. 2 PERSONNEL MANAGEMENT PROJECT, APPENDICES TO THE FINAL STAFF REPORT (Dec. 1977).

[290] UNITED STATES GENERAL ACCOUNTING OFFICE, CIVIL SERVICE REFORM: DEVELOPMENT OF 1978 CIVIL SERVICE REFORM PROPOSALS 36 (1988) (remarks of Harriet Jenkins, Task Force on Equal Employment Opportunity and Affirmative Action) (transcript of a seminar held jointly by the GAO and the Senate Governmental Affairs Subcommittee on Federal Services, Post Office, and Civil Service on March 31, 1988).

[291] 2 PERSONNEL MANAGEMENT PROJECT, APPENDICES TO THE FINAL STAFF REPORT app. IV at 19 (Dec. 1977). The task force cited the following reports as significant: "'Behind the Promises: Equal Employment Opportunity in the Federal Government,' by Ralph Nader's Public Interest Research Group (1972); (2) 'The Federal Civil Rights Enforcement Effort — To Eliminate Employment Discrimination,' by the U.S. Commission on Civil Rights (1975); and 'Staff Report on Oversight Investigation of Federal Enforcement of Equal Employment Opportunity Laws,' prepared for the Subcommittee on Equal Opportunities of the Committee on Education and Labor, U.S. House of Representatives (1976)." *Id.*

dures hindered complainants' exercise of their rights; defendant agencies controlled the complaints process; complainants had insufficient access to information; defendant agencies decided whether discrimination existed; the CSC Appeals Review Board rarely found for complainants; class complaints procedures were inadequate; and agencies rarely disciplined discriminating officials.[292] Even the CSC, in a **1974** report from a task force headed by its Deputy Executive Director, "questioned the impartiality of discrimination advice provided to Federal employees by persons who are the functional extensions of management."[293]

Task Force **4** conducted outreach meetings with "a wide variety of persons and groups" and observed general agreement that the complaints system was too long and complex; that EEO counselors were relatively ineffective because of poor training and low rank; and that an independent and impartial body should hear complaints and other appeals.[294] The task force recommended elimination of the counseling process; arbitration of complaints; EEOC review; and the right to a trial de novo in United States district court following a final administrative decision.[295]

2. Organizing *for* Merit Protection — Task Force 8 (Roles, Functions, and Organization for Personnel Management) also found an organizational conflict of interest in the CSC's "serving simultaneously as management agent for an elected partisan official and as protector of the federal personnel system against partisan abuse, and acting concurrently as a staff agency assisting other agencies in personnel management and as a 'neutral' third-party adjudicatory body."[296] The task force considered "that part of the merit protection role that concerns the adjudication of disputes between employees and agency management . . . to be both in fact and in appearance incompatible with the responsibility of a central management staff agency to assist operating departments and agencies in managing the workforce."[297]

Task Force 8 recommended dividing CSC functions and authorities between a Federal Personnel Management Agency and a Merit Systems Review Board, in much the way that the OPM and MSPB

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[292] *Id.* app. IV at 19-20 (quoting from ***Staff Report on Oversight Investigation of Federal Enforcement of Equal Employment Opportunity Laws,*** 12-13 (1976), prepared for the Subcommittee on Equal Opportunities **of** the Committee on Education and Labor, United States **House** of Representatives).

[293] *Id.* app. IV at 21.

[294] *Id.* app. IV at *23.*

[295] *Id.* app. IV at 26.

[296] *Id.* app. VIII at 1.

[297] *Id.* app. VIII at 2.

ultimately absorbed them (including the creation of a Special Counsel).[298] Unlike Task Force 4, however, Task Force 8 recommended assigning adjudicatory responsibility to the MSPB, and assigning the OPM responsibility for the policy and supervisory functions of the federal EEO and affirmative action programs.[299]

3. The Personnel Management Project Leadership — The Personnel Management Project leadership[300] sought to replace bias and complexity with impartiality and simplicity.

> Additional procedures will add little in the way of protection, and will result primarily in more red tape. In lieu of more process, the staff has concluded that more meaningful safeguards can be provided by greater organizational insulation of the appeals and investigative functions.
>
> Employees with complaints now face a confusing array of possibilities — appeal vs. grievance vs. discrimination complaint. They also face a bewildering tangle of rules, regulations and procedures as well as deadlines to be met to avoid losing an appeal on procedural grounds.[301]

The Personnel Management Project leadership recommended the Task Force 8 approach to jurisdiction over discrimination complaints.[302] An independent agency, the "Merit Protection Board," would be "the keystone of the proposed safeguarding of merit principle~. The leadership also recommended reforms to "clarify and simplify the procedures for appeals, grievance, and discrimination complaints to make them easier to understand and to use."[304]

Recommended Merit Protection Board functions included

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[298] *Id.* app. VIII at 4-11.

[299] *Id.* app. VIII at 13-14.

[300] The Personnel Management Project leadership consisted of the chairman, vice-chairman, executive director, and deputy executive director. 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT ii (Dec. 1977).

[301] *Id.* at 5-6.

[302] *Id.* at 6-7.

[303] *Id.* at 6.

[304] *Id.* Appeals not involving discrimination would be simple: the employee appeals following the agency decision; the MPB provides a hearing and decision; the agency implements the MPB decision. *Id.* at 74.

The discrimination complaints process would consist of five steps: (1) filing with the agency; (2) fact finding and conciliation attempts by the agency EEO director; (3) final agency decision; (4) appeal to MPB (optional); (5) civil suit in United States district court. *Id.*

A negotiated grievance procedure would be a covered employee's exclusive appeals route for all matters within its scope, but discrimination complaints would not be grievable. Filing a discrimination complaint (appealable to the MPB) would foreclose any other type of grievance or appeal on the same issues. *Id.* at 60-61.

investigating and correcting incidents of prohibited political activities; adjudicating employee appeals "related to virtually all types of personnel actions;" investigating and deciding discrimination complaints; and reviewing other personnel systems for compliance with merit principles.[305] Merit Protection Board jurisdiction over employment discrimination cases manifested the Personnel Management Project leadership's recognition that unlawful discrimination is inimical to a merit system.[306] The leadership rejected Task Force 4's recommendation (regarding EEOC jurisdiction) "in order to establish a single organizational unit to resolve virtually all types of complaints from Federal employees."[307]

The CSC's process suffered from complexity due to multiple organizations' involvement with appeals, confusing patterns jurisdiction, and overlapping avenues of appeal.[308] The Personnel Management Project leadership sought to replace that with a clear avenue of relief for any particular complaint, and a simple and timely appeals process.[309] Merit Protection Board jurisdiction over discrimination complaints was central to this effort.[310]

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[305] *Id.* at 55.

[306] The Final Staff Report did not articulate a list of merit principles or prohibited personnel practices, such as those specified by the CSRA, but the Project leadership clearly considered discrimination-free employment a merit principle.

> The main idea of the merit system is to hire people into the civil service on the basis of their qualifications, and to advance people and retain them in the service on the basis of their relative performance on the job and their ability to take on more responsible work. No other considerations should apply in hiring, promoting, or retaining career employees—not political party, race, color, sex, religion, national origin, marital status, age, handicap, or other factors unrelated to the job.

Id. at 51. "As a fundamental part of protecting merit principles, employees individually need strong protection from arbitrary or capricious personnel actions and from discrimination based on politics, race, color, sex, religion, national origin, age, marital status, or handicap." Id. at 53.

[307] *Id.* at 73. Those favoring the Task Force 4 approach pointed to a perceived conflict between protecting the merit system and bringing about changes in merit procedures to accomplish EEO objectives; a divergence between private sector and federal sector EEO programs; and the EEOC's success in spurring private-sector progress through enforcement and threat of enforcement. *Id.* at 237-38. The Project leadership, however, were "not persuaded that a transfer of Title VII responsibility to the Equal Employment Opportunity Commission [was] either necessary or desirable." Id. at 238. They envisioned the OPM as a powerful entity capable of implementing a vigorous EEO program; they discerned a conflict of interest to be created by vesting the EEOC with both EEO program responsibility and complaints adjudication responsibility, similar to that from which the CSC suffered; and they believed that management involvement in the EEO program was crucial to success in the federal work place. Id. at 238-39.

[308] *Id.* at 58.

[309] *Id.* at 60-61.

[310] *Id.* at 73.

C. Implementing Personnel Management Project Recommendations

Even before the Personnel Management Project leadership had signed off on the Final Staff Report, another group of subject-matter experts assembled to develop reorganization plans and proposed legislation to implement Personnel Management Project recommendations.[311]

1. Reorganization Pian Number 1—President Carter adopted Task Force 4's recommendation for EEOC jurisdiction. He sent Reorganization Plan Number 1 to Congress, addressing equal employment opportunity exclusively, a week before he submitted proposed civil service reform legislation.[312] The President expressed concern about conflicts of interests, disparities between federal and private employees' rights, and uniformity of equal employment opportunity standards.[313] Accusing the CSC of lethargy "in enforcing fair employment requirements within the Federal government"[314] he transferred all of the CSC's equal employment opportunity responsibilities to the EEOC, including complaint adjudication.[315]

The House and Senate committee reports on Reorganization Plan Number 1 reveal the contemporary concerns of Congress. The House cited the CSC's conflict of interest; the need for uniform guidelines, standards, rules, and procedures applicable to the federal and private sectors; the burden CSC rules and procedures impcsed on federal employees; undue delay in complaints processing; the EEOC's expertise in employment discrimination matters;

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[311] SHIGEKI, *supra* note 15, at 18.

[312] President Carter submitted Reorganization Plan Number 1 on February 23, 1978; he submitted proposed reform legislation on March 2. ***See*** Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 U.S.C. app. at 1574 (1994), *and in* 92 Stat. 3781 (1978); SHIGEKI, *supra* note 15, at 1.

[313] Transfer of the Civil Service Commission's equal employment opportunity responsibilities to EEOC is needed to ensure that: (1) Federal employees have the same rights and remedies as those in the private sector and in State and local government; (2) Federal agencies meet the same standards as are required of other employers; and (3) potential conflicts between an agency's equal employment opportunity and personnel management functions are minimized. The Federal government must not fall below the standard of performance it expects of private employers.

Message of the President, *supra* note 17.

[314] *Id.*

[315] Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 5 **U.S.C.** app. at 1574 (1994), *and in* 92 Stat. 3781 (1978). President Carter transferred Equal Pay Act and Age Discrimination in Employment Act enforcement from the Department of Labor and the CSC to the **EEOC.** These actions reduced "from fifteen to three the number of Federal agencies having important equal employment opportunity responsibilities under Title VII of the Civil Rights Act of 1964 and Federal contract compliance provisions." Message of the President, *supra* note 17.

and the need to foster employee confidence in the fairness of the system.[316]

The Senate pointed to

> [i]nconsistent standards of compliance, particularly between the public and private sectors; [d]uplicative, inconsistent paperwork requirements and investigative efforts; [c]onflicts within agencies between their program responsibilities and their responsibility to enforce the civil rights laws; [clonfusion on the part of workers about how and where to seek redress; [and][l]ack of accountability.[317]

Both the House and the Senate noted the overlap between EEOC jurisdiction and that proposed for the MSPB.[318] Senate reservations about the contemplated scheme for sharing jurisdiction[319]

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[316]Commission rules and procedures governing complaints are said to be more burdensome to Federal employees than those issued by the EEOC for employees in the non-Federal sectors. Despite a statutory limitation of 180 days for the processing of complaints by government employees, the Government-wide average for the processing of complaints was 398 days in fiscal year 1976.

> Of great importance in evaluating the merit of this transfer is the built in conflict of interest that exists within the Civil Service Commission.
>
> . . .
>
> The advantages in transferring the equal employment function of the Civil Service Commission to the Equal Employment Opportunity Commission are numerous and clear. Most important is the fact that the EEOC is an agency within the Federal Government which has developed experience and expertise in the field. It is independent of other inconsistent commitments and can freely devote itself to its mission. Guidelines and standards will be produced that will be harmonious for both Federal and private employment and Federal employees with equal opportunity complaints will be subject to the same rules and procedures as employees in the private sector. Confidence of Federal employees in the fairness of government personnel practices will be enhanced.

H.R. REP. NO. 1069, 95th Cong., 2d Sess. 5 (1978).

[317]S. REP. NO. 750, 95th Cong., 2d Sess. 1-2 (1978).

[318]H.R. REP. NO. 1069, 95th Cong., 2d Sess. 6 (1978); S. REP. NO. 750, 95th Cong., 2d Sess. 10-12 (1978).

[319]The jurisdictional overlap between the EEOC and the Merit Protection Board, combined with the broadly conceded difficulty separating merit from discrimination issues when they are raised in the same appeal, leads the committee to conclude that the Administration's proposal in section 3 would ultimately render more difficult the achievement of timely justice for Federal employees under Merit System principles or under title VII of the Civil Rights Act.

> Under the proposed systems of appeals, the Merit Protection System Board [sic] alone would decide cases in which only merit issue were involved; the EEOC would handle cases where only discrimination issues were raised; and in mixed cases, the MSPB would make an initial determination but this determination could be overruled by the EEOC.

forced President Carter to agree to delay implementation pending Congress's consideration of his proposed reform legislation.[320] Congress responded with the mixed case procedure described in part I.[321]

2. *The Civil Service Reform Act and Reorganization Plan Number* 2—The drafters used Reorganization Plan Number 2 to redesignate the CSC as the MSPB and to prescribe, to the extent possible, the organization and functions of the newly-created OPM, MSPB, and OSC.[322] The proposed legislation established for the first time an express set of statutory merit principles and prohibited personnel practices.[323] It also covered, inter alia, creation of the SES, due process for misconduct-based and performance based actions, merit staffing, employee compensation, and labor-management relations.[324]

President Carter sent the proposed legislation to Congress on March 2, 1978,[325] and followed two months later with Reorganization Plan Number 2.[326] Neither legislative body vetoed the reorganization plan.[327] The Senate passed one version of the CSRA on August 24, 1978; the House passed another one month later, on September 23. The Senate and House agreed to the conference report on October 4 and 6 respectively, and the President signed the CSRA into law on October 13, 1978,[328] less than eight months after he submitted the proposed legislation.

The CSRA generally reflected the concerns of the Personnel Management Project. It codified merit principles; provided for an independent MSPB and OSC; protected whistleblowers; vested the

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This division of responsibilities could produce simultaneous or sequential appeals ending up with quite different final determinations.

S. REP. No. 750, 95th Cong., 2d Sess. 10-12 (1978).

[320]Letter from President Carter to Senator Abraham A. Ribicoff (undated), *reprinted in* S. REP. No. 750, 95th Cong., 2d Sess. 17-18 (1978).

[321]Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 205, 92 Stat. 1111, 1140-43 (codified as amended at 5 U.S.C. § 7702 (1994)); *see supra* part I.E.3.

[322]*See* Reorganization Plan No. 2 of 1978, 3 C.F.R. 323 (1978), *reprinted in* 5 U.S.C. app. at 1577 (1994), *and in* 92 Stat. 3783 (1978); *see also* SHIGEKI, *supra* note 15, at 20.

[323]United States Civil Service Commission, draft of the Civil Service Reform bill dated January 10, 1978, *reprinted in* SHIGEKI, *supra* note 15, at 22-25.

[324]*See* SHIGEKI, *supra* note 15, at 20.

[325]*Id.* at 1.

[326]Reorganization Plan No. 2 of 1978, 3 C.F.R. 323 (1978), *reprinted in* 5 U.S.C. app. at 1577 (1994), *and in* 92 Stat. 3783 (1978).

[327]SHIGEKI, *supra* note 15, at 42. *See supra* notes 4, 17 regarding the ill-starred legislative veto provision of the Reorganization Act.

[328]SHIGEKI, *supra* note 15, at 1.

OPM with supervisory powers over executive branch personnel management; established a new performance appraisal system and standards for performance-based removal; prescribed due process for disciplining and removing employees; created an SES; created a merit pay system for certain managers; authorized the OPM to test new approaches for personnel administration; and created a statutory basis for federal labor-management relations.[329]

D. Good Intentions; Unmet Expectations

The preceding discussion highlighted the following general concerns that inspired the reforms of 1978:

- the CSC's conflict of interest and resulting bias against complainants
- confusing patterns of jurisdiction, with overlapping avenues of appeal
- procedures described variously as complex, confusing, burdensome, and bewildering
- inordinate delay
- agency control of the complaints process; ineffective counselors; unsatisfactory investigations
- disparity between the rights and remedies of federal employees and private sector employees
- lack of employee confidence in the fairness of the system

Eighteen years later, many of these concerns still linger. The Senate considered legislation in 1992 and 1993 to restructure the federal employment discrimination complaints process.[330] The Committee on Governmental Affairs found the following:

- agencies controlling the complaints process have an inherent conflict of interest331
- complicated procedures and overlapping jurisdiction for mixed cases332
- insufferable delays333

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[329]*See* S. REP. No. 969, 95th Cong., 2d Sess. 2 (1978), ***reprinted in*** 1978 U.S.C.C.A.N. 2723, 2724. Congress eliminated the merit pay system in 1993. Performance Management and Recognition System Termination Act, Pub. L. No. 103-89, 107 Stat. 981 (1993).

[330]Federal Employee Fairness Act **of** 1993, S. 404, 103d Cong., 1st Sess. (1993); Federal Employees Fairness Act of 1992, S. 2801, 102d Cong., 2d Sess. (1992).

[331]S. REP. No. 484, 102d Cong., 2d Sess. 7 (1992).

[332]*Id.* at 10.

[333]*Id.* at 7.

• ineffective counselors and unsatisfactory investigations[334]

• lack of employee confidence in the fairness of the system[335]

How far have we really come since 1978?

1. Discrimination cases—

a. Complaints Processing—For all the criticism directed at the CSC model for discrimination complaints processing, one might have expected the EEOC to devise a new system that was more fair, efficient, and user friendly. Instead, the EEOC adopted CSC procedures wholesale, merely substituting itself for the CSC as the adjudicator.[336] Amendments over the years never diverted the EEOC process from the CSC model: the agency counsels on, accepts or dismisses, investigates, and decides discrimination complaints; the employee may appeal to the EEOC.[337] As the Senate Government Affairs Committee pointed out, these procedures preserve the agency conflict of interest that undermines the effectiveness and perceived or real fairness of the entire process.[338]

b. Delay—Complex, inefficient procedures exact additional costs beyond confusion and frustration; they beget delay. Delay prolongs uncertainty, creates stress, and generates opportunities for disputes to snowball into reprisal complaints, the leading basis of discrimination allegations in fiscal year 1994.[339] Witnesses transfer, quit, retire, or die. Those still available by the time of a hearing may forget what they once knew about the case, or become frustrated by repeated questioning from EEO counselors, investigators, and rotating party counsel during the interminable prelude to a hearing. Unresolved discrimination complaints do not improve with age.

How protracted is the process? Consider the open complaints inventory for fiscal year 1994. Complaints pending acceptance or dismissal had been open an average of 196 days; those pending

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[334] *Id.* at 8-9.

[335] *Id.* at 8.

[336] Equal Employment Opportunity in the Federal Government, 43 Fed. Reg. 60,900 (1978) (codified at 29 C.F.R. pt. 1613 (1979)).

[337] *See* 29 C.F.R. pts. 1613, 1614 (1995); *cf.* 5 C.F.R. pt 713 (1978). The part 1614 procedures, which became effective on October 1, 1992, tinker at the fringes but adhere to the basic CSC model.

[338] *See supra* notes 331-35 and accompanying text.

[339] Reprisal accounted for 11,608 (19.1%) of the 60,944 allegations of discrimination in 24,592 formal complaints during fiscal year 1994 UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT OS EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 20-21.

agency investigation averaged 257 days; those pending a hearing averaged 377 days; and those pending a final agency decision averaged 466 days.[340] Although the average processing time for a complaint to proceed from filing to final agency decision was 356 days,[341] it was another story which an EEOC administrative judge held a hearing and the complainant appealed the final agency decision to the EEOC: the average time from filing a complaint to the EEOC's final decision on appeal was over 800 days.[342] Agency decisionmaking, plentiful opportunities for appeal, and long appellate processing times slow the process to a crawl while the inventory grows.[343]

c. ***Overlapping*** Jurisdiction — Part II described the roles of the MSPB, the negotiated grievance procedure, and the FLRA in adjudicating or reviewing discrimination complaints. The MSPB decides discrimination issues in mixed appeals.[344] Arbitrators decide discrimination issues in grievances.[345] The FLRA interprets discrimination laws when reviewing exceptions from arbitration decisions on nonmixed grievances,[346] and the MSPB does so in the case of mixed grievances.[347]

Bifurcation of CSC jurisdiction was necessary to eliminate the conflict of interest between that agency's management and adjudicatory responsibilities. Elimination of the CSC's conflict, however, did not require scattering adjudicatory responsibility among the EEOC, MSPB, FLRA, and negotiated grievance procedure. Labyrinthine review procedures were the price of congressional efforts to balance

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[340] *Id.* at 44. These figures actually reflect an improvement from fiscal year 1993. Complaints pending acceptance or dismissal had been open an average of 313 days in fiscal year 1993; those pending investigation, 305 days; those pending a hearing, 484 days; and those pending a final agency decision, 438 days. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1993 at 34.

[341] UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 34.

[342] *Hearings*, *supra* note 20 (statement of Timothy P. Bowling, United States General Accounting Ofice).

[343] From fiscal years 1991 to 1994, the number of discrimination complaints filed increased by 39 percent; the number of requests for a hearing before an EEOC administrative judge increased by about 86 percent; and the number of appeals to EEOC of agency final decisions increased by 42 percent. Meanwhile, the backlog of requests for EEOC hearings increased by 65 percent, and the inventory of appeals to EEOC of agency final decisions tripled.

Id.

[344] *See supra* part II.E.1-3.

[345] *See supra* part II.F.2, 4.

[346] *See supra* part II.F.2.

[347] *See supra* part II.F.4.

the MSPB's merit protection role with the EEOC's "role of principal Federal agency in fair employment enforcement."[348]

2. Civil Service Cases—The MSPB is one of the brighter lights of federal employment litigation. It decided 13,160 cases in fiscal year 1995, ninety percent of which were appeals of agency personnel actions.[349] Administrative judges issued initial decisions an average of ninety-six days after filing.[350] The Board also averaged ninety-six days to review initial decisions.[351] The United states Court of Appeals for the Federal Circuit left MSPB decisions untouched in ninety-four percent of the cases appealed, a much higher success rate than other administrative agencies enjoy in other circuit courts of appeal,[352] and the EEOC differed with the MSPB in only one of 140 mixed cases.[353]

The General Accounting Office recently evaluated the MSPB's performance, management, and operations, and reported the results to the Senate Committee on Government Affairs:

> The responses from practitioner groups reflect a general view that MSPB has been fair in processing employee appeals of agency personnel actions. MSPB's fairness in processing employee appeals was further indicated by the fact that over the 4-year period ending September 1994, 91 percent of the final MSPB decisions appealed to the

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[348]Message of the President, *supra* note 17 ***See,*** *e.g.*, S. REP. NO. 969, 95th Cong., 2d Sess. 52-53 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2774-75 (describing efforts to strike a careful balance between powers of the MSPB and the EEOC, to "protect against inconsistent decisions by the Board and Commission, to prevent forum shopping, and to make the procedures for consideration of the same matter by both agencies as streamlined as possible.").

> Members of Personnel Management Project Task Force **4** were surprised by how far in the opposite direction from what [they] said that the law went, which was to simplify and make less complex the discrimination complaints system. There is a mixed case section that appears to be a nightmare. I am not sure that many cases come up. But it was one of the great surprises we received when the act came out.

UNITED STATES GENERAL ACCOUNTING OFFICE, CIVIL SERVICE REFORM: DEVELOPMENT OF 1978 CIVIL SERVICE REFORM PROPOSALS 37 (1988) (remarks of Harriet Jenkins, Personnel Management Project Task Force on Equal Employment Opportunity and Affirmative Action) (transcript of a seminar held jointly by GAO and the Senate Governmental Affairs Subcommittee on Federal Services, Post Office, and Civil Service on March 31, 1988).

[349]*Hearings, supra* note *20* (statement of MSPB Chairman Benjamin Erdreich).

[350]*Id.*

[351]*Id.*

[352]PETER BROIDA, A GUIDE TO MERIT SYSTEMS PROTECTION BOARD LAW AND PRACTICE 2148 (1994).

[353]*Hearings, supra* note 20 (statement of MSPB Chairman Benjamin Erdreich).

U.S. Court of Appeals for the Federal Circuit were upheld; the remainder were either reversed or returned to MSPB for further action.[354]

The MSPB does not, however, have jurisdiction (let alone exclusive jurisdiction) over every civil service case, notwithstanding its responsibility "for safeguarding the effective operation of merit principles in practice."[355] The Board does not review arbitration decisions on Chapters 43 and 75 grievances; those cases go directly to the Federal Circuit.[356] *An* agency must implement an unlawful arbitration decision that favors the grievant if the OPM is not interested in appealing or the court exercises its discretion to deny the OPM petition for review.[357] Ironically, the MSPB would have jurisdiction to review the same arbitration award if the underlying grievance alleged unlawful discrimination as an affirmative defense to the Chapter 43 or 75 action.[358] Rogue arbitration decisions can undermine the MSPB's merit protection efforts.

The MSPB also lacks jurisdiction to review arbitration decisions on grievances involving civil service actions that would be appealable to the MSPB but for the availability of the negotiated grievance procedure.[359] For example, a bargaining unit employee who is denied a within-grade pay increase must use the negotiated grievance procedure if it does not exclude the dispute. The FLRA, not the MSPB, reviews any arbitration award,[360] and the FLRA decision generally is not subject to judicial review.[361] There is no mechanism for reconciling FLRA interpretations of civil service law with MSPB precedent, notwithstanding that "the focus of the FLRA's work is really federal workplace disputes and institutional

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[354] UNITED STATES GENERAL ACCOUNTING OFFICE, MERIT SYSTEMS PROTECTION BOARD: MISSION PERFORMANCE, EMPLOYEE PROTECTIONS, AND WORKING ENVIRONMENT 3 (1995).

[355] S. REP. NO. 969, 95th Cong., 2d Sess. 6 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723,2728.

[356] 5 U.S.C. § 7121(f) (1994). The respondent agency has no appeal rights, and the OPM can appeal only in substantial impact cases at the court's discretion. *Id.* § 7703(d) (1994); see *supra* part II.F.3.

[357] In Horner v. Garza, 832 F.2d 150 (Fed. Cir. 1987), the court denied the OPM's petition for review of an arbitration decision that mitigated a Chapter 43 action, contrary to MSPB and Federal Circuit precedent. *Cf.* Cornelius v. Nutt, 472 U.S. 648 (1985) (arbitrator required to follow MSPB precedent in employee discipline cases).

[358] 5 U.S.C. § 7121(d) (1994).

[359] *Id.* § 7121; see *supra* part II.F.l.

[360] 5 U.S.C. § 7122 (1994).

[361] Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988); see *supra* note 254 and accompanying text.

relationships, as opposed to the appeals process for federal employees."[362]

The system for adjudicating civil service cases is in better shape than that for discrimination complaints, but limitations on MSPB jurisdiction present the opportunity for disparate results in like cases. This becomes especially apparent when one examines recent developments in the area of arbitrator power.

3. Arbitrator Power—Congress recently amended the CSRA to empower arbitrators to order an agency-party to discipline an employee whom the arbitrator finds has committed a prohibited personnel practice against the grievant.

> (A) The provisions of a negotiated grievance procedure providing for binding arbitration . . . shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order—
>
> (ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.
>
> (B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.[363]

Suppose an arbitrator orders the agency to remove a nonprobationary competitive service manager whom the arbitrator finds discriminated[364] against the grievant. Where does that leave the manager and the agency? The manager was not a party to the grievance, and may not have even appeared before the arbitrator. The arbitrator's power is either unconstitutional or illusory.

The agency must notify the manager of the proposed removal and afford the due process required by statute.[365] What happens if the deciding official determines, based on all the evidence, including

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[362] *Hearings, supra* note 20 (statement of **FLRA** Chair Phyllis Segal). In contrast, consider the elaborate scheme for coordinating MSPB and EEOC decisions in mixed cases. See *supra* **part** II.F.3.

[363] 5 U.S.C. § 7121(b)(2) (1994) (as amended by United States Ofice of Special Counsel, Merit Systems Protection Board: Authorization Act, Pub. **L.** No. 163-424, § 9, 108 Stat. 4361, 4365 (1994)). Of the disciplinary actions listed in 5 U.S.C § 1215(a)(3), an agency would otherwise have authority to impose a removal, a suspension, or a reprimand.

[364] Discrimination is a prohibited personnel practice. *5* U.S.C. § 2302(b)(1) (1994).

[365] *See supra* note 59 and accompanying text.

that presented by the manager, that no discipline is appropriate? The statute is unconstitutional if the deciding official must impose discipline anyway. If the deciding official has discretion to not impose discipline, then the arbitrator really has no power to order it.

The manager has a property interest in that job.[366] Deprivation of such a property interest requires due process of law.[367] Due process includes the right to notice of the charges, an explanation of the employer's evidence, and an opportunity to respond *prior* to the deprivation, followed by a postdeprivation administrative hearing and judicial review.[368] The predeprivation opportunity to respond is designed to provide "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[369]

The agency violates the Fifth Amendment, therefore, if it removes the manager without a predeprivation opportunity to respond. The same constitutional violation arises if the agency gives the manager the opportunity to respond but disregards the manager's evidence because the arbitrator's order requires discipline in any event; that kind of "due process" would be a sham. That the manager may appeal the removal "to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration"[370] does not save the statute. Due process requires an opportunity to persuade the deciding official not to impose the deprivation in the first place.[371]

No administrative judge or ALJ has authority to order discipline of an employee who is not a party to the action from which the order issues. The MSPB has no such authority. The EEOC has no such authority. The FLRA has no such authority. No court has such authority. It is inconceivable that an arbitrator should have that authority.

IV. Unscrambling Federal Merit Protection

Federal employment disputes currently march to the beat of too many different drummers. These cases all involve merit princi-

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[366] **Board of Regents v. Roth, 408 U.S. 564 (1972).**

[367] *Id.*; U.S. CONST. **amend. V.**

[368] Cleveland **Bd. of Educ. v.** Loudermill, **470 U.S. 532 (1985); see also** Mathews **v. Eldridge, 424 U.S. 319 (1976) (defining the balancing test for determining what process is due).**

[369] *Loudermill*, 470 **U.S. at** 533.

[370] **5 U.S.C. § 7121(b)(2)(B) (1994).**

[371] *Loudermill*, **470 U.S. at 542-45.**

ples, yet no inherent logic ties together the array of procedures that can apply. This part describes proposals that mend current system defects by: (1) expanding MSPB jurisdiction at the expense of the EEOC and the FLRA; (2) abandoning the CSC model of complaints processing in favor of the MSPB model; (3) integrating and focusing administrative review to ensure consistent interpretation of discrimination and civil service laws; and (4) aligning arbitrator powers with those of administrative judges in similar cases.

Employees will retain all current substantive rights; they will know how and where to proceed with their cases; and they will obtain faster decisions based on consistent interpretation of federal law. These proposals do not tamper with collective bargaining rights, and they preserve the role of the negotiated grievance procedure in resolving bargaining unit employees' disputes. They will reduce the burden on agency personnel offices and may even save the taxpayers some money along the way. The changes discussed below are interrelated components of systemic reform; Appendix B depicts the revised process in flow chart form.

A. *Expanding MSPB Jurisdiction*

The MSPB will absorb EEOC jurisdiction over discrimination complaints against federal employers. The MSPB also will absorb FLRA jurisdiction to review arbitration decisions on grievances alleging discrimination,[372] *grievances alleging other prohibited personnel practices, and civil service grievances for which the negotiated grievance procedure is the exclusive forum.*[373] *Finally, the MSPB will acquire jurisdiction to review arbitration decisions on Chapters 43 and 75 grievances, on petitions for review from either party or the OPM.*[374]

There is no compelling reason for the EEOC to adjudicate federal employees' discrimination complaints, and no justification for the current diffusion of jurisdiction among the MSPB, EEOC, and FLRA. The description of the various processes in part II was painfully intricate; transferring EEOC and FLRA jurisdiction to the MSPB will foster simplicity, consistency, and fairness, and it will bring discrimination-free employment into the fold with the other merit principles.

Employee advocates might be skeptical. Is the MSPB an appropriate repository for such sweeping jurisdiction? Are collective bar-

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[372] *See supra* **part** II.F.2.

[373] *See supra* **part** II.F.1.

[374] *See supra* **part II.F.3.**

gaining rights at risk? Will the influx of new cases immediately overwhelm the MSPB? These are reasonable questions in light of experience with the last group of reforms, but the answers are favorable.

1. Management Bias?—Is the MSPB an unfriendly forum for discrimination complainants? MSPB initial decisions in mixed cases include findings of discrimination about two percent of the time.[375] At first blush, this appears seriously out of step with the nearly thirteen percent of EEOC hearing decisions that recommended a finding of discrimination in fiscal year 1994.[376] Closer examination, however, reveals that the MSPB does not differ significantly from the EEOC in its interpretation and application of discrimination laws.

An MSPB administrative judge conducts the hearing in a mixed case, but the complainant may petition the EEOC for review of the final MSPB decision.[377] Where the EEOC grants review, it examines the MSPB decision for whether "as a matter of law—(i) the decision of the Board constitutes an incorrect interpretation of any provision of any [discrimination] law, rule, regulation, or policy directive . . . or (ii) the decision involving such provision is not supported by the evidence in the record as a whole."[378] If the MSPB lacked sufficient expertise in the field of employment discrimination law, or if it were biased in applying that law to the facts in mixed cases, one would expect a substantial number of cases in which the EEOC "issue[d] in writing another decision which differ[ed] from the decision of the Board."[379] In the last five years, however, the EEOC has disagreed with the MSPB in only nine (1.2%) of 732 mixed cases presented on petition.[380]

A more likely explanation for the statistical differences between the decisions of MSPB and EEOC administrative judges is the unique nature of a mixed case. Once a discrimination complainant presents a prima facie case, the respondent agency can defeat the presumption of discrimination by articulating a legiti-

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[375] *See* UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1994 at 28 (two percent of 359 initial decisions); UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1993 at 48 (two percent of 833 initial decisions); UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1992 at 55 (three percent of 314 initial decisions).

[376] UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 48.

[377] 5 U.S.C. § 7702(b) (1994).

[378] *Id.* § 7702(b)(3).

[379] *Id.* § 7701(b)(3).

[380] *Hearings, supra* note 20 (statement of MSPB Chairman Benjamin Erdreich).

mate nondiscriminatory reason for the action.[381] The complainant then must prove by preponderant evidence that the articulated reason for the action was merely pretext for discrimination.[382] A mixed case, by its very nature, incorporates a legitimate nondiscriminatory reason for the personnel action taken. The due process prerequisites to a Chapter 43 or 75 action force the agency to articulate and support the basis for the personnel action.[383] Even if the administrative judge finds that the agency lacked the necessary basis for the personnel action, the record often will support agency claims of honest mistake rather than intentional discrimination. Absent a smoking gun, the mixed case appellant has an uphill struggle.

The availability of a civil trial de novo provides an escape valve. Complainants will migrate to United States district court at the earliest opportunity if the MSPB proves hostile to their claims. A mass exodus from the administrative process is unlikely, however. The General Accounting Office found that unions and private attorneys who represent federal employees generally are confident in the fairness of the MSPB.[384]

2. Delay on *the* Horizon?—Merit Systems Protection Board regional offices received 9965 initial appeals during fiscal year 1995;[385] during the same period, aggrieved individuals filed 24,592 EEO complaints with respondent agencies.[386] Might not this combined docket, along with broader jurisdiction to review grievance arbitration decisions, overwhelm the MSPB? Fortunately, proposed procedural reform will liberate sufficient resources to fund a robust MSPB fit for the task.

The EEOC had seventy-seven administrative judges in its district offices at the end of fiscal year 1994.[387] Those judges will trans-

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[381] McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

[382] The complainant must prove both that the articulated reason was false, and that discrimination was the real reason. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

[383] *See supra* notes 59, 66 and accompanying text.

[384] UNITED STATES GENERAL ACCOUNTING OFFICE, MERIT SYSTEMS PROTECTION BOARD—MISSION PERFORMANCE, EMPLOYEE PROTECTIONS, AND WORKING ENVIRONMENT 3 (1995). Sixty-three percent of private attorneys, and 59% of union officials surveyed believed that the MSPB regional ofices (administrative judges) almost are always or generally fair; 17% and 15% respectively believed that the regional offices were fair about as often as not. ***Id.*** at 7. Forty-six percent and 81% respectively believed that the MSPB headquarters was almost always or generally fair; 25% and 6% believed that it was fair as often as not. *Id.* at 8.

[385] UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1994 at 24.

[386] *Hearings, supra* note 20 [statement of EEOC Chairman Gilbert F. Casellas).

[387] UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 50.

fer to MSPB regional and field offices. Based on an average production of 120 cases per EEOC administrative judge per year,[388] and 25,000 new cases per year, the MSPB may need as many as 130 additional judges to keep up with the case load under the procedures proposed below.[389]

The EEOC had thirty-nine appellate counsel at the end of fiscal year 1994.[390] Those counsel, who analyze cases on appeal and draft proposed EEOC decisions, will transfer to the MSPB to perform similar duties in the MSPB Office of Appeals Counsel.[391] Assuming 7500 appeals of discrimination cases annually, and an annual production of 140 appeals per attorney, the MSPB may need as many as fifteen additional appellate attorneys to remain current with the case load.[392]

The MSPB also will need additional support staff at both the headquarters and regional levels, although economies of scale and automation should avoid the need for a proportionate increase. Where will the MSPB find the resources for fifteen appellate attorneys, third administrative judges, and an undetermined number of support staff? Federal agencies reported spending over $33.6 million to investigate discrimination complaints in fiscal year 1994.[393] The procedural reforms, discussed below, eliminate the agency investigation from the complaints process,[394] and create the opportunity to reprogram sufficient resources to hire the necessary personnel.[395]

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[388]The average number of resolutions per administrative judge was 124.3 in fiscal year 1994, 126.1 in fiscal year 1993, 113.5 in fiscal year 1992, and 94.6 in fiscal year 1991. Id.

[389]This is a very conservative estimate. The actual need for administrative judges should be lower, because many of these complaints will be resolved shortly after filing (and, therefore, require less of the assigned administrative judge's time). For example, the EEOC reported 21,565 cases closed by various means in fiscal year 1994; of those, 28% were dismissed. Id. at 33. Assuming that the dismissal rate held steady, only 18,000 of the 25,000 new formal complaints would be accepted. Rather than 130 new administrative judges, therefor, the figure would be closer to 74.

[390]*Id.* at 65.

[391]*See* UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1994 at 17.

[392]The EEOC received 7141 appeals in fiscal year 1994; appellate attorneys handled an average of 146 appeals each. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 61, 65.

[393]*Id.* at T-21.

[394]*See infra* part IV.B.l-3.

[395]Interagency "turf wars" pose a traditional barrier to transferring money and positions within the executive branch, but that does not change the fact that will be available on the macro level. Turf wars can be circumvented through executive order or statutory directive. Agencies will need to retain some of the liberated resources, however, because procedural reforms pushing cases to litigation earlier would likely generate a need for additional litigation staff.

3. Inferior Employment *Rights* and Remedies? — President Carter issued Reorganization Plan Number 1 to "ensure that: (1) Federal employees have the *same rights* and remedies as those in the private sector and in State and local government; [and] (2) Federal agencies meet the same standards as are required of other employers."[396] Equal Employment Opportunity Commission jurisdiction over complaint adjudication is not an essential element to achieving either objective.

It is misleading to state that federal employees have, or should have, the same rights and remedies as private sector employees. The EEOC does not adjudicate complaints against nonfederal respondents; it investigates, attempts to conciliate, and then either sues in United States district court on behalf of the complainant or issues the complainant a "right to sue" letter authorizing the complainant to proceed alone.[397] The EEOC does not represent federal-sector complainants in United States district court;[398] private sector complainants, however, do not enjoy the opportunity for two hearings—an administrative adjudication followed by a civil trial. Litigation rights and remedies have never really been the same.

This dichotomy betrays the fallacy of protests that transferring EEOC jurisdiction to the MSPB will lead to separate sets of substantive rights. The EEOC currently has no power to align the common law of private-sector employment discrimination with the administrative common law of federal employment discrimination, because the EEOC is a party to private-sector cases[399] and the adjudicator of

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[396] Message of the President, *supra* note 17 (emphasis added).

[397] 42 U.S.C. § 2000e-5 (Supp. V 1993).

[398] The unitary executive theory would prevent the EEOC from representing a complainant in an Article III court against another federal agency. Federal agencies, including independent agencies such as the EEOC, are part of the executive branch. Since "[t]he executive Power [is] vested in a President of the United States of America," these agencies are agents of the President. U.S. CONST. art. III, § 1, cl. 1. The President cannot be both the plaintiff and the defendant in the same lawsuit.

[399] Prior to 1972, the EEOC could investigate private-sector charges and attempt conciliation, but could not sue on behalf of the complainant. The Equal Employment Opportunity Act of 1972 gave the EEOC prosecutorial power, but denied it any power to issue cease-and-desist orders. "[C]ongressional Republicans were concerned with conferring fact-finding responsibilities on the EEOC. The agency had 'attained an image as an advocate for civil rights,' and thus there was opposition to increasing the EEOC's enforcement authority centered on the fear that an over-zealous agency would be acting as investigator, prosecutor, and judge. Moreover, Title VII claims were perceived as calling for little policy balancing and much fact-finding, at which judges were believed more adept." Rebecca Hanner White, *The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 **UTAH** L. REV. 51, 62-66 (citations omitted).

One could argue that the EEOC currently has an institutional conflict of interest, because it is the investigator and prosecutor for the claims of one set of employees (private sector), and the judge for the claims of another set of employees (federal sector). The Personnel Management Project leadership "believe[d] that assigning policy,

federal-sector cases. Private-sector cases are litigated in United States district court. Federal-sector complainants have access to the same forum on exhausting administrative remedies. Article III courts presently are, and will remain, the only common forum for both classes of complainants. The Supreme Court and the United States Circuit Courts of Appeals will continue to shape the direction of employment discrimination law.[400]

President Carter's second stated objective, that "Federal agencies meet the *same standards* as are required of other employe r ~ ,refers to the EEOC's responsibility for developing, where feasible "uniform standards, guidelines, and policies defining the nature of employment discrimination on the ground of race, color, religion, sex, national origin, age or handicap under all federal statutes, executive orders, regulations, and policies which require equal employment opportunity."[402] The proposed transfer of complaints jurisdiction leaves the EEOC with these responsibilities, as well as the responsibility for reviewing, approving, and monitoring federal agencies' affirmative employment plans and programs.[403] Moreover, the proposal invests the EEOC with authority to seek **MSPB** reconsideration of discrimination cases that the EEOC believes reflect a significant misinterpretation of a federal discrimination law or policy.[404]

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assistance, and adjudicatory functions concerning equal employment opportunity to the Equal Employment Opportunity Commission [would] set up within that agency the same kind of role conflict for which the Civil Service Commission has been criticized." 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT 238 (Dec. 1977).

[400] The Supreme Court has given limited deference to EEOC interpretations of Title VII, because Congress has not delegated to that agency authority to issue substantive legislative rules. ***See*** EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991); General Electric Co. v. Gilbert, 429 US. 125 (1976). This limited deference frustrates EEOC efforts to align private-sector common law with its own federal-sector administrative precedent. To the extent that EEOC interpretations merit deference, however, federal courts would apply those interpretations, where appropriate, to federal-sector cases litigated in the district courts. This provides a means to reel in the MSPB should it stray too far with the proposed jurisdiction over pure discrimination complaints. For a discussion of deference accorded to EEOC interpretive guidelines, ***see*** White, ***supra*** note 399.

[401] Message of the President, ***supra*** note 17 (emphasis added).

[402] Exec. Order No. 12,067, § 1-301, **43** Fed. Reg. 28,967 (1978), ***reprinted as amended in*** 42 U.S.C. § 2000e (1988). This executive order was one of several implementing Reorganization Plan Number 1. ***But see supra*** note 400 (limited judicial deference to EEOC interpretive guidelines).

[403] Affirmative employment is a program for creating a federal work force reflective of the United States population. The EEOC provides agencies with guidance on their affirmative employment programs; reviews and approves those agencies' affirmative employment plans; and monitors the implementation of affirmative employment policies and programs. 42 U.S.C. § 20003-16(b) (1988); UNITED STATES GENERAL ACCOUNTING OFFICE, EEOC: FEDERAL AFFIRMATIVE PLANNING RESPONSIBILITIES 1-2 (1993).

[404] ***See infra*** part IV.B.1, ***3,*** 4.

Transferring EEOC federal-sector complaints jurisdiction to the MSPB will not lead to a divergence between federal-sector and private-sector employee rights and remedies, and changing the fact finder will not erode the substantive rights at issue. Civil servants will not fall to a disfavored status in equal employment opportunity law. They will enjoy relief from much of the confusion, delay, and inconsistency inherent in the current system.

4. Employees from Other Merit Systems — The EEOC complaints process currently is available to a much broader range of employees than is the MSPB appeals process. Nonappropriated fund employees and employees of government corporations, for example, may invoke the federal-sector discrimination complaints process, but have no MSPB appeal rights.[405] Would the proposed expansion of MSPB jurisdiction push the Board beyond its competence? The answer is no.

There is nothing inherently incompatible with a single body having more limited jurisdiction for one class of cases than another. Even within the MSPB's current jurisdiction, prerequisites to appeal rights vary with the type of dispute.[406] Congress has recognized the MSPB's competence to look beyond the CSRA by assigning it responsibility to "conduct . . . special studies relating to . . . other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected[.]"[407] It is, after all, the Merit Systems Protection Board.

B. Abandoning the CSC Model; Integrating Review

The proposals that follow are designed to inject logic, consistency, and (where possible) simplicity into the administrative process. Time-tested MSPB procedures provide a nucleus around which to assemble the procedures for handling discrimination complaints, mixed cases, and grievances. Individuals who believe that they have been wronged will look to the MSPB for redress unless they are covered by a collective bargaining agreement, in which case they may elect or be required to use the negotiated grievance procedure. The MSPB will perform any administrative review regardless of whether a hearing decision originates with an arbitrator or an administrative judge. Transforming the complaints process from the CSC model to the MSPB model will eliminate agency conflicts of interest. Elimination of unnecessary procedures will save money and reduce

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[405] *See supra* **part** II.B.l.

[406] *Id.*

[407] 5 U.S.C. § 1205(a)(3) (1994)

delay. Rerouting of administrative review will simplify the process, enhance consistency, and reduce forum shopping. None of these changes will erode substantive employee rights or place employees at a procedural disadvantage.

1. Individual Discrimination Complaints — This subsection departs from the EEOC's current CSC model of agency processing in favor of the MSPB model of impartial adjudication. The agency no longer will be a party, investigator, and decision maker in the same case.[408] The elimination of unnecessary administrative steps will accelerate the process and save resources. **A** faster process will mean a briefer period during which workplace relations are strained, perhaps reducing allegations of reprisal for engaging in the complaints process.[409] It also should foster more accurate hearing decisions because the availability of witnesses and evidence will improve.

The faster process need not mean less protection for complainants. Counselors will continue to conciliate disputes; discovery will substitute for the agency investigation; and the specter of an imminent hearing will sharpen the focus of issues for both sides and encourage settlement where appropriate.

a. Counseling and Conciliation—

The MSPB will assign equal employment opportunity counselors to locations readily accessible by federal employees. Counselors will have thirty days to investigate the allegations, meet with the parties, and facilitate party attempts to resolve matters informally. The

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[408]The committee report on S. 2801, the Federal Employees Fairness Act of 1992, discussed the conflict of interest at length.

> **A** [1987] study of EEO officials on the effect of the agency adjudicating the claim against itself was conducted by the Washington Council **of** Lawyers, a non-partisan, voluntary bar association. . . . The survey of 350 EEO officers in **4** Agencies found an overwhelming majority of the officers believed that the conflict inherent in the process impaired its function. EEO counselors indicated that they often felt little clout to deal with the issue when the alleged discriminator held a higher position in the agency. In situations where the counselor concluded that discrimination had occurred, they reported greatly increased scrutiny of the decision creating a built-in incentive to find no discrimination. EEO officers reported that witnesses against the agency often feel intimidated by supervisors. In some situations, the alleged discriminating official, who often views settlement as a concession of wrongdoing and opposes it for that reason, must approve the offer. At one agency, the general counsel has exclusive authority to accept or reject a complaint. That same general counsel also defends against the complainant at the hearing illustrating the dual role of the agency to defend against and to adjudicate discrimination complaints.

S. REP. NO. **484,** 102d Cong., 2d Sess. 7-8 (1992).

[409]*See* ***supra*** note 339.

parties may agree to extend the counseling period for another sixty days to pursue mediation or other alternatives to litigation.

Counselors who are MSPB employees will enjoy greater independence and credibility than agency counselors. The MSPB can ensure that counselor training and education in discrimination law, investigation, and conciliation is more uniform and more thorough. The job will no longer be a mere collateral duty of, for example, a government contracts specialist.[410] These measures will enhance the professional stature of counselors, and should help slow or even reverse the decline in the proportion of cases resolved during the counseling process.[411]

Locating MSPB EEO counselors at or near the sites where agency counselors currently work will present logistical challenges, but the advantages of colocation outweigh the disadvantages. The counselor must be readily accessible to employees and must be sufficiently familiar with the agency to know where to look, whom to talk to, and how best to resolve disputes within the particular organization. The General Accounting Office collected counseling cost data from thirteen civilian cabinet departments and sixteen Department of Defense agencies for fiscal year 1991; these agencies reported spending over $40 million on counseling.[412] Counseling is a huge task, but the efficiencies of a focused, professional corps of counselors may generate a net cost savings.

Alternative dispute resolution (ADR) increasingly is in vogue as a partial solution to crowded dockets.[413] The administrative process itself is an alternative to court litigation, but **ADR** techniques, like

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[410] More than 89% of agency EEO counselors in fiscal year 1994 performed the mission as a collateral duty. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS **AND** APPEALS FOR FISCAL YEAR 1994 at 17.

[411] *See supra* note 164 and accompanying text.

[412] UNITED STATES GENERAL ACCOUNTING OFFICE, **FEDERAL** WORKFORCE, AGENCIES' ESTIMATED COSTS FOR COUNSELING AND PROCESSING DISCRIMINATION COMPLAINTS 13-14 (1992).

[413] For a sampling of current literature on the use of ADR in employment law, *see* PETER M. PANKEN, AMERICAN LAW INSTITUTE — AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION, AVOIDING EMPLOYMENT LITIGATION: ALTERNATIVE DISPUTE RESOLUTION OF EMPLOYMENT DISPUTES IN THE 90'S (1995); Stephen J. Lacher, *Alternative Dispute Resolution (ADR) in the '90s and Beyond — A View from the Neutral's Seat*, 67 N.Y. ST. B.J. 45 (Oct. 1995); ROBERT B. FITZPATRICK, AMERICAN LAW INSTITUTE — AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION, ALTERNATIVE DISPUTE RESOLUTION- TYPES OF ADR MECHANISMS (1995); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1 (1995); Joshua D. Rosenberg & H. Jay Folberg, *Alternative Dispute Resolution: An Empirical Analysis*, 46 **STAN.** L. REV. 1487 (1994); Michael W. Hawkins, *Alternative Dispute Resolution: An Alternative for Resolving Employment Litigation ana' Disputes*, 20 N. **KY.** L. REV. 493 (1993).

mediation can prove useful when the parties must continue to work together following the ultimate resolution of the dispute. This proposal preserves the available sixty-day extension of the counseling period to allow for mutually agreed-on pursuit of ADR.[414]

b. The Complaint —

The complainant will have fifteen days from the end of the counseling period to file a complaint with the MSPB regional or field office and serve a copy on the respondent agency. The MSPB regional or field office will assign the case to an administrative judge who will determine whether to accept or dismiss the complaint. The administrative judge may dismiss the complaint sua sponte or on the respondent's motion. The complainant and the respondent will receive notice of the administrative judge's intent to dismiss sua sponte and will have fifteen days to file briefs in support or opposition. The respondent will serve the complainant with a copy of any motion to dismiss and the complainant will have fifteen days to file a brief in opposition. The complainant may appeal a dismissal to the MSPB within thirty-five days of the administrative judge's decision; the respondent will have no right to appeal prior to the administrative judge's issuance of an initial decision on the merits.

Equal Employment Opportunity Commission regulations currently require complainants to file their complaints with the respondent agency,[415] which then determines whether to accept or dismiss the complaint on grounds other than the merits.[416] The complainant may appeal a dismissal to the EEOC.[417] Appeals generate delay. This proposal should reduce the number of improper dismissals, because administrative judges can evaluate complaints more impartially, if not more accurately, than agencies accused of discrimination.

Agencies currently have no authority to dismiss complaints for lack of substance; an agency must investigate even patently nonmeritorious cases, afford the complainant the opportunity for a hearing, and issue a final agency decision. The proposed procedures provide early access to an administrative judge who can adjudicate a motion to dismiss frivolous complaints.

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[414] *See* 29 C.F.R. § 1614(d), (f) (1995). The MSPB has initiated an ADR program to facilitate settlement of appeals pending review before the full Board, as well as a pilot settlement judge program at its regional and field offices. The regional and field offices assign an administrative judge to the appeal, "but a separate settlement judge works with the parties to try to settle the case. If settlements are not successful, the appeal is adjudicated by the judge assigned to the case." UNITED STATES MERIT SYSTEMS PROTECTION BOARD, ANNUAL REPORT FOR FISCAL YEAR 1994 at 12-13.

[415] 29 C.F.R. § 1614.106 (1995).

[416] *Id.* § 1614.107.

[417] *Id.* § 1614.401.

When an administrative judge dismisses a complaint[418] on either procedural grounds or because it is frivolous, the complainant should have greater confidence in the fairness and accuracy of that decision than had the agency made it. Greater employee confidence and enhanced accuracy of decisions should combine to reduce appeals. Fewer appeals and earlier dismissal of frivolous cases should mean a faster administrative process.

c. The Agency Investigation—

The agency will not conduct formal investigations of complaints.

Agencies spent over $33 million investigating discrimination complaints in fiscal year 1994.[419] Less than sixty-four percent of the investigations completed that year were completed within 180 days, and sixteen percent were open more than nine months.[420] These investigations are not worth time and resources of that magnitude.

The most obvious problem with the agency investigation is the agency's inherent conflict of interest. The agency is accused of discrimination, yet it is supposed to assign or hire someone to "develop a complete and impartial factual record."[421] Just how complete and impartial is that factual record? Consider the findings of the Senate Committee on Governmental Affairs:

> The Committee found that the agency's ability to control the information upon which a decision is based, allows the agency to control the outcome of the decision. Complainants essentially can only take information for their case from an investigation developed by the agency.
>
> The Governmental Affairs Committee confirmed in its investigation that where agencies are concerned, there

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[418] The proposal preserves current grounds for dismissal: the complaint fails to state a claim on which relief can be granted; the complaint states a claim already pending before the MSPB, or that has already been decided by the MSPB; the complainant failed to meet the deadlines described above (counselor contact within 45 days, formal complaint within 15 days of end of counseling period); or the claim is moot or not yet ripe. *See id.* § 1614.107.

[419] UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at T-21. This figure reflects the costs of investigations by agency personnel and those performed by contractors. The former conducted 10,612 investigations in fiscal year 1994; the latter performed 3785. *Id.*

[420] *Id.* at T-24.

[421] 29 C.F.R. § 1614.108(b) (1995). Private contractors performed more than a quarter of agency investigations in fiscal year 1994. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at T-21.

> was usually a lack of consistency and quality in investigations. Two-thirds of investigators surveyed said they would not routinely obtain the SF 171, a personnel form, frequently critical to the defense that a person was not qualified. Almost half of the investigators did not usually ask the complainant and the alleged discriminator to respond to each other's statements. This allows little opportunity to resolve inconsistencies. A significant number of EEO officials who relied on the investigations found them insufficiently probing. Additionally, investigators feel that, as a result of their lack of authority, they find it difficult to arrange meetings with witnesses and discriminating employees.[422]

An investigation ostensibly serves several purposes. It creates an administrative record for the agency head to evaluate to make the final agency decision on the complaint. The final agency decision, however, is infected with the conflict of interest inherent in the agency's dual status as respondent and decision maker. Elimination of the final agency decision erases that justification for an investigation.[423] The investigation also is a source of information for the parties to evaluate when assessing the merits of their respective cases; the congressional findings above, however, cast doubt on the investigation's utility in this regard.

One would expect a fairly high rate of withdrawal or settlement on completion of the report if the parties had confidence in the agency investigation. Agencies completed 14,388 investigations in fiscal year 1994.[424] During the same period, complainants withdrew 897 complaints before the hearing stage, and the parties settled 2836 before the hearing stage.[425] Assuming that completed investigations inspired all these closures,[426] the disposition rate would be a little over twenty-five percent. On the other hand, fifty-two percent of settlements and fifty-four percent of withdrawals in fiscal year 1994 occurred after an administrative judge became involved with the case and the parties had an opportunity for discovery.[427]

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[422] S. REP. NO. 484, 102d Cong., 2d Sess. 9 (1992).

[423] *See supra* part II.D.1.

[424] *Id.*

[425] UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 33, 47.

[426] In practice, many settlements and withdrawals occur prior to completion of the investigation.

[427] UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FEDERAL SECTOR REPORT ON EEO COMPLAINTS AND APPEALS FOR FISCAL YEAR 1994 at 33, 47.

The proposal gives the parties earlier access to discovery;[428] and discovery, combined with the prospect of a timely hearing, sharpens the focus of issues and inspires the parties to evaluate their respective cases more realistically. Equal Employment Opportunity Commission procedures take too long to reach that stage. One way to reduce the delay is to eliminate the investigation,

d. Discovery—This subsection outlines the MSPB discovery process[429] as adapted to discrimination complaints.

The administrative judge will notify the parties of their right to initiate discovery methods permitted by the Federal Rules of Civil Procedure.[430] *The parties will have twenty-five days from notification to serve each other with initial discovery requests or motions. Discovery responses will be due within twenty days.* A *party may serve a supplemental request within ten days of receiving the prior response, unless the administrative judge directs otherwise.*

Parties may request that the administrative judge issue a subpoena for documents or things. The administrative judge will rule on motions to quash. A *party may file a motion to compel discovery within ten days of the unmet deadline for a request or within ten days of receiving objections to the request. The administrative judge has discretion to order or limit discovery, and will establish the date by which the parties shall complete discovery. Discovery issues are not subject to further review.*

Equal Employment Opportunity Commission Management Directive MD-110,[431] combined with the reguiations at part 1614 of

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[428] *See* infra part IV.B.1.d.

[429] *See* 5 C.F.R. §§ 1201.71to 1201.74 (1995).

[430] *Methods* to Discover ***Additional*** Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written question; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

FED. R. CIV. P. 26(a)(5).

In General, Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Id. 16(b)(1).

[431] UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R.—Part 1614, EEO MD-110, ch. 6, at 9-16.

the Code of Federal Regulations, provides a comprehensive discovery process with a fairly optimistic schedule. Those procedures are not necessarily inferior to those of the MSPB; however, using uniform discovery procedures will further the interests of consistency, simplicity, efficiency, and timeliness. Experience with mixed MSPB appeals, which by definition include discrimination issues, has demonstrated the suitability of MSPB discovery procedures for discrimination cases.[432]

e. Summary Judgment—

Either party may move for summary judgment upon completion of discovery. The opposing party has fifteen days to file an opposition brief: An award of summary judgment will constitute an initial decision.

Summary judgment can play an important role in the resolution of discrimination complaints. The parties will develop their cases during the discovery process. Either party may move for summary judgment if discovery reveals no genuine and material issues of fact. Denial of the motion will not be reviewable; the parties will litigate the case at a hearing. The parties may petition for review of a partial award of summary judgment, but the Board may choose to postpone that review pending the administrative judge's decision on the remainder of the case.

Current EEOC regulations provide for an administrative judge's decision analogous to summary judgment, but the case does not reach that stage until after the investigation, and the decision is merely a recommendation to the agency.[433] Summary judgment should dispose of complaints that might have been withdrawn following completion of an agency investigation. The administrative judge's early involvement with the case will facilitate expeditious disposition.

f: The Hearing —

The administrative judge will conduct a hearing according to procedures generally applicable to MSPB appeals.[434]

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[432]Merit Systems Protection Board discovery rulings are subject to judicial scrutiny by the Federal Circuit on appeal from the final decision. The standard of review is abuse of discretion. Curtin v. Office of Personnel Management, 846 F.2d 1373, 1379 (Fed. Cir. 1988); Spezzaferro v. Federal Aviation Admin., 807 F.2d 169, 173 (Fed. Cir. 1986). The de novo nature of "judicial review" of EEOC decisions, on the other hand, forecloses any judicial check on EEOC administrative judges' discovery rulings because the case begins anew in federal court.

[433]*See* 29 C.F.R. § 1614.109(e) (1995).

[434]*See* 5 C.F.R. §§ 1201.51 to 1201.64 (1995). Section 1201.56, however, prescribes burdens of proof and affirmative defenses that are tailored for MSPB appeals, and inappropriate for pure discrimination cases. This regulation would yield to applicable statutory law and case precedent. See supra note 179 and accompanying text.

Current EEOC hearing procedures are not substantially different from MSPB hearing procedures. The rules of evidence do not apply strictly; witnesses testify under oath; and the administrative judge has discretion to limit cumulative witnesses and evidence, the power to exclude persons for contumacious behavior, and discretion to draw adverse inferences from the failure to produce required evidence.[435] The major procedural difference is that while the MSPB holds open hearings, and the EEOC hearings are closed because they are part of the investigative process.[436] The hearing will no longer be part of the investigative process, and MSPB administrative judges will have discretion to close discrimination complaint hearings where appropriate.[437] Applying uniform procedures to civil service and discrimination cases will simplify the overall system.

g. The Initial Decision—

The administrative judge will issue an initial decision within 180 days of the date that the complainant filed the complaint, such period to be extended by any time elapsed in the appellate process. The administrative judge may extend the period by sixty days to allow the parties to complete discovery in exceptionally complex cases.

The administrative judge's decision will not be a recommendation to the agency; it will be an initial decision that becomes the MSPB's final decision absent a timely petition for review. This change avoids the agency's current conflict of interest. The agency is a party; it should not also be a decision maker.

Equal Employment Opportunity Commission regulations give the respondent agency head sixty days to adopt the recommended decision or to issue a contrary decision. The complainant may appeal that decision to the EEOC. Eliminating this step will cut sixty days from the administrative process and eliminate the need for agencies to maintain staffs that review the recommended decisions and draft final agency decisions.

The 180-day deadline for initial decisions recognizes that necessary discovery can be more extensive in discrimination cases than in civil service cases. Extensions beyond 180 days, however, will be reserved for truly unusual cases.

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[435] *See* 29 C.F.R. § 1614.109 (1995); UNITED STATES EQUAL EMPLOYMEST OPPORTUNITY COMMISSION, OFFICE OF FEDERAL OPERATIONS, ADMINISTRATIVE JUDGE'S HANDBOOK, EEOC ORDER 960.003 §§ 300-600 (July 1,1991).

[436] 5 C.F.R. § 1201.52 (1995); 29 C.F.R. 1614.109(c) (1995).

[437] 5 C.F.R. § 1201.52 (1995).

h. Remedies—

The initial decision will include findings on the amount of any compensatory damages if the MSPB administrative judge finds discrimination.

Equal Employment Opportunity Commission administrative judges who find discrimination currently do not specify the amount of compensatory damages in the recommended decision.[438] The agency head determines a damage award somewhere between zero and $300,000. The complainant who prevails at the hearing is unlikely to accept the discriminating agency's calculation at face value; an appeal to the EEOC is a practical certainty. Merit Systems Protection Board administrative judges in mixed cases, on the other hand, determine the amount of compensatory damages in their initial decisions.[439] Doing the same in discrimination cases should reduce appeals, because an administrative judge does not have the agency's incentive to "low-ball" the complainant, and the complainant is more likely to have confidence in the impartiality of the administrative judge's decision.

i. Administrative Review—

The parties will have thirty-five days to petition the MSPB for review of the initial decision. The MSPB will review the initial decision de novo, with deference to credibility findings based on demeanor. The initial decision becomes the MSPB final decision if neither party files a timely petition for review.

The procedures for obtaining review of initial decisions on a discrimination complaint will generally follow those applicable to MSPB appeals. This uniformity fosters simplicity and consistency.

j. EEOC Petition for Reconsideration—

The EEOC may petition the MSPB for reconsideration of a final decision that the EEOC believes reflects an erroneous interpretation of federal discrimination law or policy. The EEOC petition is timely if filed within thirty-five days of the MSPB final decision. The MSPB will dismiss a pending EEOC petition for reconsideration if the complainant files a civil action for a trial de novo in United States district court. The MSPB decision on reconsideration is not subject to judicial review, but the complainant retains the right to file a civil action for a trial de novo in United States district court.

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[438] Memorandum from James H. Troy, Director, Office of Program Operations, EEOC, to District Directors and Administrative Judges (Oct. 6, 1993).

[439] *See* Hocker v. Department of Transportation, 63 M.S.P.R. 497, 505 (1994).

The EEOC can provide the MSPB with the benefit of its expertise by petitioning for reconsideration of final decisions. This will be an opportunity for the MSPB to reconcile its case law with the positions that the EEOC advocates on behalf of private-sector employees. The EEOC's views will not bind the MSPB, but its involvement in a case will highlight any problems that may warrant congressional oversight.

k. Judicial Review—

The MSPB final decision will bind the respondent agency, The complainant may file a civil action for a trial de novo in United States district court at any of the following stages of the administrative process: within ninety days of a final decision dismissing all or part of a complaint; within ninety days of the MSPB's final decision on the merits; at any time after 180 days from filing the complaint, in the absence of a final decision, if no appeal is pending; or at any time after 180 days from appealing to the MSPB, if the MSPB has not yet issued a decision.

A *complainant alleging age discrimination may file a civil action any time within 180 days of the alleged discriminatory event, after providing the MSPB thirty days notice of intent to sue.*

The pendency of an EEOC petition for reconsideration of a final MSPB decision shall not extend the complainant's ninety-day deadline for filing a civil action.

Complainants will enjoy the same opportunities for judicial review from MSPB decisions that they enjoy from agency and EEOC decisions. The final administrative decision will continue to bind agencies. The United States district courts and the circuit courts of appeal will develop and reconcile the common law of federal-sector employment discrimination with that of the private sector, ensuring that federal complainants are not relegated to second-class status.

The ability to abandon the administrative process 180 days after filing the complaint should not undermine the MSPB process. If the administrative case is progressing on schedule, the complainant has an incentive to secure a final decision before resorting to the courts. Age discrimination cases will remain an exception to exhaustion requirements.[440] Perhaps they should be fully integrated with Title VII and Rehabilitation **Act** rights and remedies, but that is a policy question for another day.

2. Class Discrimination Complaints — Class complaint procedures will generally follow those for individual complaints, with

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[440] *See* 42 U.S.C. § **633a** (1988).

modifications as discussed below. These procedures continue to limit the agency to the role of a party, ameliorating the conflicts of interest that currently prolong the administrative process. The administrative judge, not the respondent agency, will decide whether to certify the class;[441] whether settlements are fair and adequate for the class as a whole;[442] whether the agency committed unlawful discrimination; and the type and amount of any class-wide or individual relief. The proposals that follow build on the individual complaint procedures just described.[443]

a. Acceptance or Dismissal of the Complaint—

The administrative judge will determine, following notice to the parties and their opportunity to submit briefs, whether the putative class meets the requirements of numerosity, commonality, typicality, and adequacy of representation.[444] The class representative may appeal to the MSPB or proceed with an individual complaint if the administrative judge refuses to certify the class.

The administrative judge is free of the agency's conflict of interest. Enhanced credibility of decision making should bolster complainant confidence in system fairness, reduce the number of appeals, and expedite the administrative process.

b. Notice to the Class—

The administrative judge, upon certifying a class, will order the respondent agency to notify class members of this certification.

This proposal follows current EEOC procedures.[445]

c. Discovery—

The administrative judge may extend discovery deadlines where the complexity of the litigation so requires.

The initial decision on an individual complaint is due within 180 days from filing. Class complaints can present more complex issues and can be more cumbersome to manage. This proposal recognizes that complex litigation may take more time.

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[441] Under EEOC regulations, an administrative judge recommends whether to certify the class, and the agency has 30 days to accept or reject that recommendation. 29 C.F.R. § 1614.204(d) (1995).

[442] Under current EEOC regulations, the administrative judge reviews class member objections to a proposed settlement, and makes a recommendation as to whether the settlement is fair and reasonable. The agency then makes the final decision, which is appealable to the EEOC Office of Federal Operations. Id. § 1614.204(g)(4).

[443] *See* supra part IV.B.l.

[444] *See supra* note 203 and accompanying text.

[445] *See* 29 C.F.R. § 1614.204(e) (1995).

d. Settlement—

The administrative judge will review any proposed settlement for whether it is *fair and adequate for the class as a whole.*[446] *The administrative judge will approve a settlement that meets these criteria, and will order notice to the class. Any class member who objects to the settlement may petition the MSPB for review within thirty-five days of issuance of the notice. The MSPB will review de novo the adequacy and fairness of the settlement, and will issue a final decision binding all parties.*

Current EEO procedures require the administrative judge to provide a recommended decision on the appropriateness of a class settlement, but let the agency make the decision.[447] The proposed procedures eliminate this conflict of interest.

e. The Hearing and the Initial Decision—

The administrative judge will conduct a hearing in accordance with the procedures applicable to individual complaints. The initial decision will specify class and individual relief where appropriate.

Current EEOC procedures require a recommended decision on class and individual relief, with the agency head making the final agency decision.[448] Removing the agency from the decision making process eliminates the current conflict of interest, enhances confidence in the decision, and should lead to fewer appeals.

f. Remedies—

If the administrative judge finds no class-wide discrimination, but finds that the class representative suffered individual discrimination, the administrative judge will award the class representative individual relief available under the applicable discrimination statute for individual complaints.

If the administrative judge finds class-wide discrimination, the initial decision will order the respondent agency to cease the discriminatory policy or practice and will specify appropriate individual relief for the class representative. The administrative judge will determine individual relief for other class members following the finality of the MSPB decision.[449]

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[446] *Cf.* Parker v. Anderson, 667 F.2d 1204, cert. denied, 459 U.S. 828 (1982) (reviewing district court's approval of a settlement of a class action suit alleging discrimination by Bell Helicopter Company).

[447] 29 C.F.R. § 1614.204(g) (1995).

[448] *Id.* § 1614.204(l).

[449] *See infra* part N.B.2.h.

These procedures generally follow current EEOC procedure~.~~~

g. Administrative Review—

The initial decision will become the MSPB final decision unless the respondent agency or the class representative files a petition for review with the MSPB within thirty-five days of the initial decision. The standard of review will be the same as for individual complaints.

h. Notice of the Decision; Individual Relief—

The agency will notify the class within ten days of receiving the MSPB final decision. The notice will advise class members of their rights to seek individual relief if the decision includes a finding of class-wide discrimination.

A *class member seeking relief will submit to the administrative judge and the agency documentary evidence and affidavits establishing that the class member was aggrieved by the class-wide discrimination during the period from forty-five days before the class representative contacted the EEO counselor to the date the discriminatory policy or practice ceased. The submission will describe with particularity the injury suffered. The agency may present opposition evidence in similar form. The administrative judge may order additional documentation and affidavits from either party.*

The administrative judge will fashion individual equitable relief, including back pay, based on the record. The agency will have the right to demand a hearing, including prehearing discovery, to determine the amount of any compensatory damages. The administrative judge will issue an initial decision on individual relief Either party may petition the MSPB for review within thirty-five days. The MSPB will apply the same standard of review to the individual remedy as to individual complaints.

Equal Employment Opportunity Commission regulations currently permit class members to file timely claims for individual relief following a final decision that includes findings of class-wide discrimination. The agency rules on these claims and the claimant may appeal to the **EEOC** or file a civil action in United States district court.[451] The agency, as the confirmed discriminator, has an obvious conflict of interest. Transferring this responsibility to an administrative judge should bolster the claimant's confidence in the decision, leading to fewer appeals.

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[450] 29 C.F.R. § 1614.204(l) **(1995).**

[451] *Id.* § 1614.204(l)(3).

Equal Employment Opportunity Commission regulations do not provide for an administrative hearing on individual relief[452] even though that relief can include compensatory damages of up to $300,000 for intangible injuries such as pain and suffering. Equitable relief—such as back pay, promotion, and restored leave—also can be significant, but at least it is quantifiable. The agency should have the opportunity to test claims for intangible damages of that potential magnitude in an adversarial hearing.

i. Judicial Review—

The agency will have no right to judicial review of the MSPB final decision. The class representative may file a civil action for a trial de novo in United States district court within ninety days of a final decision denying class *certification or otherwise dismissing all or part of a complaint; within ninety days of the MSPB final decision on the merits; any time after 180 days from filing the complaint, in the absence of a final decision (if no appeal is pending); or any time after 180 days from appealing to the MSPB, if the MSPB has not yet issued a decision.* **A** *class member may file a civil action within ninety days of the MSPB final decision on that class member's individual remedy.*[453]

These procedures preserve current opportunities for judicial review.

3. Mixed Cases—The nonmixed civil service appeals process generally applies, as modified below, when an employee alleges that unlawful discrimination was the basis for a personnel action from which the employee has MSPB appeal rights.[454]

a. Counseling—

The employee may elect to pursue EEO counseling by contacting the MSPB EEO counselor within thirty days of the effective date of the personnel action. The counseling period (thirty days) and procedures applicable to individual discrimination complaints apply to counseling in mixed appeals.[455]

This proposal reflects the removal of the respondent agency from the decision-making process. The proposal retains the option

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[452]*Id.*

[453]The plaintiff could limit the civil trial to the issue of remedy, invoking administrative estoppel against the agency on the findings of class-wide discrimination. Haskins v. Department of the Army, 808 F.2d 1192, 1199 & n.4 (6th Cir.) ***cert. denied,*** 484 U.S. 815 (1987); Pecker **v.** Heckler, 801 F.2d 709, 711 *n.3* (4th Cir. 1986); Moore v. Devine, 780 F.2d 1559, 1562 (11th Cir. 1986).

[454]***See*** *supra* notes *44-53* and accompanying text.

[455]*See supra* part IV.B.1.a.

for EEO counseling, however, because counseling is a relatively effective means of resolving cases informally.[456] An individual has forty-five days to contact a counselor regarding a pure discrimination complaint, but only thirty to file a pure MSPB appeal. The proposed procedure for mixed appeals provides a workable rule by requiring the employee to either contact a counselor or file an appeal within thirty days of the effective date of the personnel action. The earlier deadline will impose no hardship on employees, because the notification of the personnel action will advise the employee of appeal rights and deadlines.[457]

b. Filing the Appeal—

The employee may file a mixed appeal within the first thirty days after the effective date of the personnel action, or within fifteen days of completing EEO counseling.

An employee who chooses not to seek counseling will comply with the general MSPB deadline for filing appeals. An employee who contacts an EEO counselor may, during that first thirty days, abandon the counseling effort and file directly with the MSPB. The fifteen-day window applicable to individual discrimination complaints[458] will apply to the mixed appeal if the employee completes counseling. These deadlines reinforce consistency among pure discrimination complaints and mixed appeals.

c. The Hearing—

The parties will conduct discovery and the administrative judge will hold a hearing according to procedures for nonmixed civil service appeals.[459]

This procedure follows current law.[460]

d. The Initial Decision—

The administrative judge will issue an initial decision within 120 days of the date the appellant filed the mixed appeal. The decision will address the civil service issues and the discrimination issues, and award relief as appropriate.

The deadline for these initial decisions is sixty days earlier than that for initial decisions on pure discrimination complaints.[461]

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[456] *See supra* note 164 and accompanying text (statistics on complaint resolution during counseling period).

[457] *See* 5 C.F.R. § 1201.21 (1995).

[458] *See supra* part IV.B.1.b.

[459] *See supra* notes 44-49 and accompanying text.

[460] 5 C.F.R. § 1201.152 (1995).

[461] The deadline is statutory. 5 U.S.C. § 7702 (1994).

The tighter schedule reflects the immediate hardship that a mixed case appellant may sustain when subjected to an otherwise appealable personnel action such as a removal, a long suspension, or a RIF. The due process prerequisites to Chapters **43** and 75 actions, moreover, create an administrative record that reduces the extent of discovery necessary.[462]

e. Administrative Review—

Either party may petition the MSPB for review within thirty-five days of the initial decision. The OPM may only petition for review of civil service issues, and only in substantial impact cases.[463]

These procedures preserve current rights to administrative review.

f. EEOC Petition for Reconsideration—

The EEOC may petition the MSPB for reconsideration of a final decision that the EEOC believes reflects an erroneous interpretation of federal discrimination law or policy. The EEOC petition is timely if filed within thirty-five days of the MSPB final decision. The MSPB will dismiss a pending EEOC petition for reconsideration if the appellant files a civil action for a trial de novo in United States district court, or if the appellant abandons all discrimination issues and appeals the civil service issues to the United States Court of Appeals for the Federal Circuit.

Mixed case appellants will no longer petition the EEOC for review of the MSPB decision. The Special Panel will no longer exist. Cases will no longer bounce between the MSPB and the EEOC. The EEOC's right to petition the MSPB for reconsideration, however, is an opportunity to inject that agency's expertise into the process. The EEOC's position will not bind the MSPB, but its participation will highlight problem areas that may warrant the attention of legislators or policy makers.

The EEOC petition will not interfere with the appellant's right to judicial review. One may assume that in most cases the appellant and the EEOC will coordinate their efforts, but the appellant retains the opportunity to file in district court or the Federal Circuit.

g. Judicial Review—

The mixed case appellant may file a civil action in United States district court for a trial de novo on the discrimination issues

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[462] *See supra* notes **59,** 66.

[463] *See supra* note **51** and accompanying **text.**

within ninety days of a final decision dismissing the mixed appeal; within ninety days of the MSPB's final decision on the merits of the mixed appeal; any time after 120 days from filing the mixed appeal, in the absence of a final decision, if no petition for review or other appeal from a decision of the administrative judge is pending; or any time after 120 days from petitioning the MSPB to review a decision of the administrative judge, if the MSPB has not yet issued a final decision. A complainant alleging age discrimination may abandon the administrative process and file a civil action on the age claim only at any time within 180 days of the alleged discriminatory event, after providing the MSPB thirty days' notice of intent to sue.

The district court judge will only review civil service issues where the appellant obtained an MSPB final decision thereon, and will apply the same standard of review that the Federal Circuit would apply to the same issues.[464]

The appellant may abandon the discrimination claim and appeal civil service issues to the United States Court of Appeals for the Federal Circuit under the procedures currently applicable to MSPB cases.[465]

The pendency of an EEOC petition for reconsideration of a final MSPB decision will not extend the appellant's deadlines for filing a civil action in United States district court, or an appeal of the civil service issues in the United States Court of Appeals for the Federal Circuit.

These procedures preserve existing rights of judicial review and ensure that EEOC petitions for reconsideration do not prolong the overall process.

4. *Grievance Arbitration — One* may expect unions to jealously guard the opportunity for binding arbitration, and properly so, because arbitration furthers congressional policy favoring collective bargaining.[466] The proposals below preserve the role of grievance arbitration in resolving employment disputes. Bargaining unit employees retain current rights to elect between the negotiated grievance procedure and available statutory appeals procedures. The **MSPB,** however, will perform all administrative review of arbitration decisions on dis-

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[464]The standard of review will consist of a review of the record to determine whether the **MSPB** decision was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. **See *supra*** note *56* and accompanying text.

[465]***See supra*** note 244 and accompanying text.

[466]*See* **5 U.S.C** § 7701(a) (1994) (Congress finds labor organizations' collective bargaining in the civil service are in the public interest); ***id.*** § 7121(a) (all collective bargaining agreements will include a negotiated grievance procedure that shall provide for binding arbitration).

putes otherwise within MSPB jurisdiction. Exclusive MSPB jurisdiction for administrative review will integrate the negotiated grievance procedure with the broader system of federal employment dispute resolution, ensuring consistent interpretation and application of civil service and discrimination laws regardless of the fact-finding forum.

a. Discrimination Grievances—

An employee grieving a pure discrimination issue must exhaust the negotiated grievance procedure. The employee will have no right to administrative or judicial review if the union declines to invoke arbitration of the agency's grievance decision. Age discrimination grievances, however, remain an exception to exhaustion requirements. The employee may file a civil action at any time within 180 days from the alleged discriminatory event, after providing thirty days notice to the MSPB.

The EEOC currently reviews agency decisions on discrimination grievances absent arbitration.[467] The EEOC, however, will no longer have jurisdiction over discrimination complaints. The MSPB does not review agency grievance decisions on mixed grievances,[468] and will not review agency decisions on other grievances under the proposed procedures. It is unrealistic to expect an appellate body to perform an effective review of the record emanating from a grievance sans arbitration. **A** bargaining unit employee who wishes to grieve a discrimination issue will first need to ascertain the union's willingness to arbitrate the matter. The union has a duty to the employee not to act arbitrarily, discriminatorily, or in bad faith when it determines whether to invoke arbitration.[469]

An alternative approach would allow the complainant to file a civil action within ninety days of the agency decision where the union does not invoke arbitration. Such an option, however, would create a short cut through administrative exhaustion. The agency controls neither the election of forum nor the union's decision whether to arbitrate. ***An*** employee desiring a civil trial at the earliest opportunity would elect the grievance procedure, convince the union not to arbitrate, and head directly to United States district court. That action would undermine the ability of the administrative process to resolve employment disputes and avoid flooding the courts.

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[467] 29 C.F.R. § 1614.401(c) (1995).

[468] Jones v. Department of the Navy, 898 F.2d 133, 134-35 (Fed. Cir. 1990); Mawson v. Department of the Navy, 48 M.S.P.R. 318, 322 (1991).

[469] Vaca v. Sipes, 386 U.S. 171, 190 (1967); National Fed'n of Fed. Employees and Crawford, 23 F.L.R.A. 684 (1984). Violation of this duty of fair representation constitutes an unfair labor practice. 5 U.S.C. § 7116(b) (1994).

(1) Administrative Review—

Either party may petition the MSPB for review within thirty-five days of an arbitration decision. The MSPB will review whether the arbitration decision was arbitrary or capricious, or reflected an erroneous interpretation of law, rule, or regulation.

The FLRA will no longer have jurisdiction over discrimination grievances. A bargaining unit employee's interests in grievances involving personal statutory and regulatory rights are distinct from the union's interest in collective bargaining.[470] When an employee elects the negotiated grievance procedure for a discrimination complaint or appealable personnel action, any resulting arbitration decision turns on the individual's rights, not those of the union.[471] The FLRA was designed to deal with the relations between institutions—unions and agencies.[472] Allowing the FLRA to dabble in discrimination law introduces needless confusion and undermines system integrity. The MSPB should displace the FLRA's jurisdiction to review these arbitration decisions. Consolidation of discrimination complaints jurisdiction in the MSPB also will eliminate EEOC review of arbitration decisions. All roads for administrative review lead to the MSPB.

The MSPB currently reviews arbitration awards only in mixed grievances, and only for whether the arbitrator erred in interpreting a law, rule, or regulation.[473] This exceptional deference to arbitrator fact finding is unwarranted. Arbitrators in federal-sector discrimination and civil service cases serve as the functional equivalent of administrative judges; they apply discrimination and civil service laws and regulations directly to the disputes.[474] Arbitrators of private-sector grievances, on the other hand, merit greater deference because they do not apply statutes directly; they enforce contracts according to the "industrial common law of the shop."[475] There is no federal-sector "common law of the shop."

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[470] *See* Cornelius v. Nutt, 472 U.S. 648, 663-64 (1985) (application of the harmful error rule turns on prejudice to the grievant, not the union; the union can file its own grievance).

[471] *Id.*

[472] "[T]he FLRA, unlike the MSPB, is not a 'personnel' agency. The FLRA is an agency that adjudicates disputes between agencies and unions, (and between unions and employees) *not* between agencies and employees." ***Hearings, supra*** note 20 (statement of John N. Sturdivant, National President, American Federation of Government Employees).

[473] Robinson v. Department of Health and Human Servs., 30 M.S.P.R. 389 (1986).

[474] *See* 5 U.S.C. § 7121(d)-(e) (1994).

[475] In the private sector, contractual rights and statutory rights

> have legally independent origins. . . . As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of

The MSPB and EEOC currently review administrative judges' decisions de novo, with deference to credibility findings based on observation of witness demeanor.[476] The proposal will not subject arbitration decisions to the same degree of administrative scrutiny, but will require that they be based on correct interpretations of law and not be arbitrary or capricious[477]—the same standard that the Federal Circuit currently applies to MSPB and arbitration decisions.[478]

(2) EEOC petition for reconsideration—

The EEOC may petition the MSPB for reconsideration of an MSPB decision, on review of a discrimination grievance arbitration award, that the EEOC believes reflects an erroneous interpretation of federal discrimination law or policy. The EEOC's petition is timely if filed within thirty-five days of the MSPB decision.

The MSPB will dismiss a pending EEOC petition for reconsideration if the grievant files a civil action for a trial de novo in United States district court.

These procedures create the same opportunities for EEOC input as discussed in the individual complaints process,[479] although the EEOC can petition for review only if a party has already obtained MSPB review of the arbitration decision.

(3) Judicial Review—

The grievant may file a civil action in United States district court for a trial de novo within ninety days of the arbitrator's decision, absent an earlier petition for MSPB review; within ninety days of the MSPB's decision on review; or any time after 180 days from petitioning the MSPB for review, absent an MSPB final decision. The

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authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties. . . . Thus an arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36, 52-54 (1974).

[476]Jackson v. Veterans Admin., 768 F.2d 1325, 1331 (Fed. Cir. 1985).

[477]An arbitration award would be arbitrary and capricious if, inter alia, the award was based on a gross mistake of fact that changed the result, *cf.* Redstone Arsenal and American Fed'n of Gov't Employees, 18 F.L.R.A. 374 (1985); the award reflected arbitrator bias or partiality, *cf.* Department of the Air Force, Hill Air Force Base and American Fed'n of Gov't Employees, 39 F.L.R.A. 103 (1991);or the arbitrator refused to consider pertinent and material evidence, *cf. id.*

[478]5 U.S.C. § 7703(c) (1994).

[479]*See supra* part IV.B.1.j.

pendency of an EEOC petition for reconsideration of an MSPB decision will not extend the grievant's deadline for filing a civil action.

The grievant's rights to judicial review will be substantially the same as if the grievant had filed a discrimination complaint with the MSPB.[480]

b. Chapters 43 and 75 Grievances—

An employee grieving a Chapter 43 or 75 action who does not allege discrimination as an affirmative defense will exhaust the negotiated grievance procedure. The employee will have no opportunity for administrative or judicial review if the union declines to invoke arbitration over the agency's grievance decision.[481]

These procedures follow current law.[482]

(1) *Administrative Review—*

Either party may petition the MSPB for review within thirty-five days of an arbitration decision. The OPM may do so only in substantial impact cases.[483] *The MSPB will review whether the decision was arbitrary or capricious or based on an erroneous interpretation of law, rule, or regulation.*

These procedures expand MSPB jurisdiction to include the review of arbitration decisions on Chapters **43** and **75** grievances at the request of either party or the OPM. The agency currently has no right to administrative or judicial review if the Chapter **43** or **75** grievant prevails at arbitration; the OPM can seek judicial review only in substantial impact cases.[484] Insulation of an arbitrator's legal error from review can create an incentive for employee forum shopping and undermine the development and application of a consistent body of civil service law.

(2) Judicial Review—

The grievant or the OPM (in a substantial impact case) may appeal the MSPB decision to the United States Court of Appeals for the Federal Circuit.

This procedure follows current law.[485]

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[480]*See supra* part IV.B.1.k.

[481]*Cf.* Mawson v. Department of the Navy, 48 M.S.P.R. 318 (1991) (MSPB will not review mixed grievance absent an arbitration decision).

[482]*See supra* part II.F.3.

[483]*See supra* note 51 and accompanying text.

[484]*See* 5 U.S.C §§ 7121(f), 7703(d) (1994); *see also supra* note 51 and accompanying text.

[485]*See supra* part II.F.3.

c. Mixed Grievances—

An employee who grieves a Chapter 43 or Chapter 75 action and raises the affirmative defense of unlawful discrimination must exhaust the negotiated grievance procedure. The employee cannot obtain administrative or judicial review if the union declines to invoke arbitration of the agency's grievance decision. Age discrimination claims remain an exception to exhaustion; the grievant may file a civil action on the age claim only within 180 days of the alleged discriminatory event, after providing thirty days notice to the MSPB.

These procedures follow current law.[486]

(1) Administrative Review—

Either party may petition the MSPB for review within thirty-five days of an arbitration decision. The OPM can only petition for review of the civil service issues, and only in substantial impact cases.[487] *The MSPB will review whether the decision was arbitrary or capricious or based on an erroneous interpretation of law, rule, or regulation.*

As with Chapters 43 and 75 grievances, this proposal expands MSPB jurisdiction to encompass review of mixed grievances at the request of either party or the OPM. Currently, only the grievant may appeal the outcome of the arbitration award in a mixed case.[488] Insulation of an arbitrator's legal error from review can create an incentive for employee forum shopping and can undermine the development and application of a consistent body of civil service and discrimination law.

(2) EEOC Petition for Reconsideration—

The EEOC may petition the MSPB for reconsideration of a decision, on review of a mixed grievance arbitration award, that the EEOC believes reflects an erroneous interpretation of federal employment discrimination law or policy. The EEOC petition is timely if filed within thirty-five days of the MSPB decision. The MSPB will dismiss a pending EEOC petition for reconsideration if the mixed case grievant files a civil action for a trial de novo in United States district court, or if the grievant abandons the discrimination issues and appeals the civil service issues to the United States Court of Appeals for the Federal Circuit.

These procedures align the negotiated grievance process with the statutory appeals process.[489]

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[486] *See supra* part II.F.4.

[487] *See supra* note 51 and accompanying text.

[488] 5 U.S.C. § 7121(d) (1994).

[489] *See supra* part IV.B.1.j.

(3) Judicial Review—

The grievant may file a civil action in United States district court for a trial de novo of the discrimination issues within ninety days of the arbitrator's decision, absent a prior petition for MSPB review; within ninety days of the MSPB's final decision on a petition for review; or any time after 180 days from petitioning the MSPB for review of arbitrator's award, if the MSPB had not yet issued a decision. The district court judge will review the civil service issues only where the appellant obtained an MSPB decision on review of the arbitration award, and will apply the same standard of review that the Federal Circuit would apply to the same issues.[490] *The district court judge will review the arbitrator's decision with the deference due the arbitrator's findings of fact.*

The appellant may abandon the discrimination issue and appeal the MSPB's decision on review of civil service issues to the United States Court of Appeals for the Federal Circuit.[491]

The pendency of an EEOC petition for review of an MSPB decision will not extend the grievant's deadline for filing a civil action in district court or an appeal in the Federal Circuit.

The grievant's opportunities for judicial review will be substantially the same as under the statutory mixed appeals process.[492]

d. Prohibited Personnel Practices Other Than Discrimination—

The alleged victim of a prohibited personnel practice other than discrimination, in a case other than a Chapter 43 or 75 action, may elect between the negotiated grievance procedure (if it does not exclude such matters) and contacting the Office of Special Counsel. An employee who elects the negotiated grievance procedure cannot obtain administrative or judicial review of the agency decision if the union declines to invoke arbitration.

These procedures follow current law.[493]

(1) Administrative Review—

Either party may petition the MSPB for review within thirty-five days of an arbitration decision. The MSPB will review whether

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[490] The district court judge will determine whether the decision was arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law. See ***supra*** note ***266*** and accompanying text.

[491] ***See supra*** note **244** and accompanying text.

[492] ***See supra*** part IV.B.3.g.

[493] ***See supra*** part II.F.5.

the decision was arbitrary or capricious or based on an erroneous interpretation of law, rule, or regulation.

The MSPB will assume the FLRA's jurisdiction over these arbitration awards, for the reasons stated in support of displacing FLRA jurisdiction over discrimination grievances.[494]

(2) Judicial Review—

The merits of the arbitration decision will not be judicially reviewable.

Employees who are not covered by a negotiated grievance procedure must enlist the services of the OSC to investigate prohibited personnel practices other than discrimination. A whistleblower who exhausts remedies with the OSC may file an IRA with the MSPB and obtain judicial review thereon.[495] Otherwise, the employee is left to the agency's administrative grievance procedure[496] and has no right to judicial redress.

Conditions of employment are the heart of collective bargaining, and the negotiated grievance procedure empowers the union to enforce statutory or contractual requirements. Arbitration decisions, however, generally are not judicially reviewable unless similar disputes outside the collective bargaining context are reviewable (such as Chapter 43 and 75 actions). The proposed procedures are consistent with current law: bargaining unit employees enjoy the access to the negotiated grievance procedure that derives from union representation. Granting bargaining unit employees a right to judicial review that employees outside bargaining units do not enjoy, however, would alter the balance of rights between bargaining unit and nonbargaining unit employee. The proposal maintains alignment of employee rights and remedies regardless of collective-bargaining status.

e. Other Personnel Actions—

An available negotiated grievance procedure is the exclusive recourse for employees to pursue disputes not involving prohibited personnel practices, Chapter 43 or 75 actions, or matters statutorily excluded from the grievance procedure.[497] *The employee has no further right of review if the union declines to invoke arbitration of the agency's grievance decision.*

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[494] *See supra* notes 470-72 and accompanying text.

[495] *See supra* notes 71-75 and accompanying text.

[496] *See* 5 C.F.R. pt. 771 (1995).

[497] *See* 5 U.S.C. § 7121(c) (1994); *see also* Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir.), cert. *denied sub nom.* Carter v. Goldberg, 498 U.S. 811 (1990).

These procedures follow current law.[498]

(1) Administrative Review—

Either party may petition the MSPB for review within thirty-five days of an arbitration decision if the underlying personnel action is one that would fall within MSPB appellate jurisdiction but for the coverage of the negotiated grievance procedure. The MSPB will review whether the decision was arbitrary or capricious or based on an erroneous interpretation of law, rule, or regulation.

A negotiated grievance procedure preempts MSPB appellate jurisdiction over matters other than Chapter **43** and **75** actions, discrimination cases, and whistleblower IRAs, if the negotiated grievance procedure does not exclude the particular type of dispute from its coverage.[499] The proposal ensures that the MSPB will perform the administrative review of all hearing decisions, be they from arbitrators or administrative judges, regarding matters within its appellate jurisdiction.500 The MSPB no longer will share with the FLRA its jurisdiction to interpret these civil service laws.

If the grievance involves a personnel action over which the MSPB would not have appellate jurisdiction, even absent a negotiated grievance procedure, the FLRA will review the arbitration award on exceptions from the parties.[501] Congress has not chosen to create MSPB appeal rights, and there is no threat of conflicting interpretations of civil service laws. Federal Labor Relations Authority jurisdiction, therefore, is consistent with the labor policy manifested in the very broad definition of grievance.[502]

(2) Judicial Review—

The grievant may appeal to the United States Court of Appeals for the Federal Circuit if the grievant would have had MSPB appeal rights but for the coverage of the negotiated grievance procedure. The OPM may also do so in substantial impact cases.[503] The Federal Circuit will apply the same standard of review that it applies to other appeals from arbitration decisions.504

These procedures actually expand the grievant's opportunity for judicial review. The FLRA currently performs administrative

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[498] *See* supra part II.F.l.

[499] 5 U.S.C. § 7121 (1994); 5 C.F.R. § 1201.3(b)-(c) (1995).

[500] *See supra* part II.B.l (describing MSPB appellate jurisdiction).

[501] 5 U.S.C. § 7122 (1994).

[502] *See* supra note 248.

[503] *See* 5 U.S.C. § 7703(d) (1994).

[504] *See id.* § 7703(c).

review of these arbitration decisions, and the FLRA decisions generally are not subject to judicial review.[505] The common thread to all these proposals is an attempt to align rights and remedies regardless of forum. The arbitrator steps in for the administrative judge in applying federal laws to the facts of grievances. There is no sound reason to provide for more limited review of an arbitrator's decision than of an administrative judge's decision.

Unlike administrative review, the availability of judicial review turns not only on the nature of the dispute but also on whether the grievant would otherwise have appeal rights. Jurisdiction for administrative review is broader because the MSPB displaces existing FLRA jurisdiction to review exceptions. The limits on judicial review ensure that bargaining unit employees enjoy the same, but not greater, rights and remedies as other employees.

C. Arbitrator Powers

An arbitrator's remedial powers will be coextensive with the powers of an administrative judge or administrative law judge presiding over the same type of dispute. The agency will forward a copy of the administrative record to the Office of Special Counsel if an arbitrator finds that an employee has committed a prohibited personnel practice against the grievant in a particular case.

Part II discussed the anomalous power of an arbitrator to order the discipline of an employee whom the arbitrator finds committed a prohibited personnel practice against the grievant.[506] The discipline would be not only unconstitutional but also bad policy if the agency truly were bound to impose it based solely upon an arbitrator's order. No other fact-finding body can order such discipline in a proceeding to which the putative offender is not a party. Why create an incentive for forum shopping when an alternative is available? Referring the matter to the OSC affords the entity tasked with prosecuting disciplinary actions against merit offenders an opportunity to bring its expertise to bear and take action as appropriate.[507]

V. Conclusion

The current discrimination complaint process is lengthy, cumbersome, and costly in terms of resources and emotional expenditures, and is frequently used for non-dis-

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[505] *See supra* note 254.

[506] *See supra* part III.D.3.

[507] *See supra* part II.C.

> crimination problems. Employees perceive it as management-controlled .... Conversely, managers see the system as conducive to abuse and as destructive, rather than helpful, to the resolution of legitimate complaints at the agency level.[508]

These remarks described the situation in 1977, yet they are apropos of the "reformed" discrimination complaint process more than eighteen years later. This is hardly a ringing endorsement for the EEOC's adherence to the CSC model of complaint processing. The Personnel Management Project leadership were right: The MSPB should have "jurisdiction over discrimination complaints as well as other types of appeals, in order to establish a single organizational unit to resolve virtually all types of complaints from Federal employees."[509] Undue delay and baffling mixed case procedures are two legacies of the failure to follow this recommendation.

Somewhere along the line, President Carter and the 95th Congress lost sight of the basic premise that unlawful employment discrimination is a prohibited personnel practice that violates merit principles.[510] They created the necessary independent body to protect the merit system, but they denied it the jurisdiction necessary to accomplish the mission.

The proposals in part IV derive from the concept that consistency, uniformity, and simplicity are important aspects of a system that is, after all, supposed to be the preferred alternative to court litigation. Those proposals overhaul the administrative processes to meet the concerns described in part III.[511]

- the MSPB will remain independent, free from the conflict of interest with which the CSC struggled
- federal agencies will not have conflicts of interest, because they will be parties, not investigators **or** decision makers, in cases in which they are charged with discrimination
- revised procedures will be simpler, more uniform, and less prone to delay
- equal employment opportunity counselors will be independent, well-trained MSPB employees
- the EEOC, FLRA, and MSPB will no longer have overlapping jurisdiction; the MSPB will conduct all administrative review

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[508] 1 PERSONNEL MANAGEMENT PROJECT, FINAL STAFF REPORT 73 (Dec. 1977).

[509] *Id.*

[510] 5 U.S.C. §§ 2301(b)(2), 2302(b)(1) (1994).

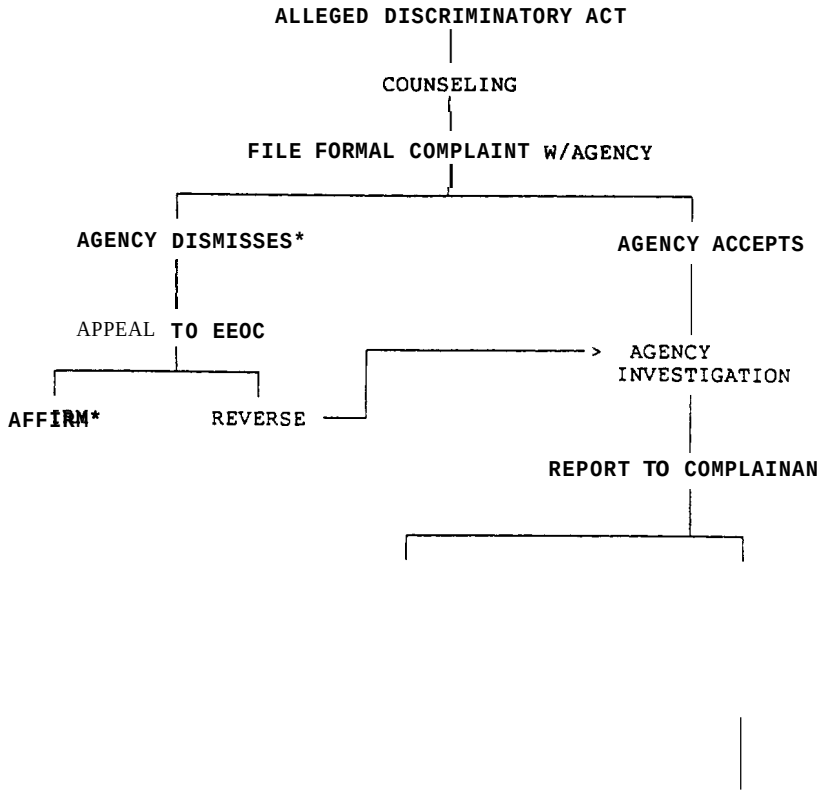
[511] *See supra* part III.D.

- federal employees' rights and remedies will remain at least as protective as those that private-sector employees enjoy
- from all these improvements should follow an increased level of employee confidence in the system's fairness

These reforms require no radical new programs or additional government agencies; they merely refocus the efforts of existing institutions to create a logical, integrated system for protecting *all* merit principles, including discrimination-free employment. These initiatives should be at least budget neutral, and may even engender savings. Implementing these changes will not be painless for individuals such as agency investigators who find themselves without jobs, and bureaucracies will squabble over the financial and staffing impacts. The alternative, however, is to persist with a system that wastes resources and serves poorly the needs of the parties, the federal government, and the American taxpayer.

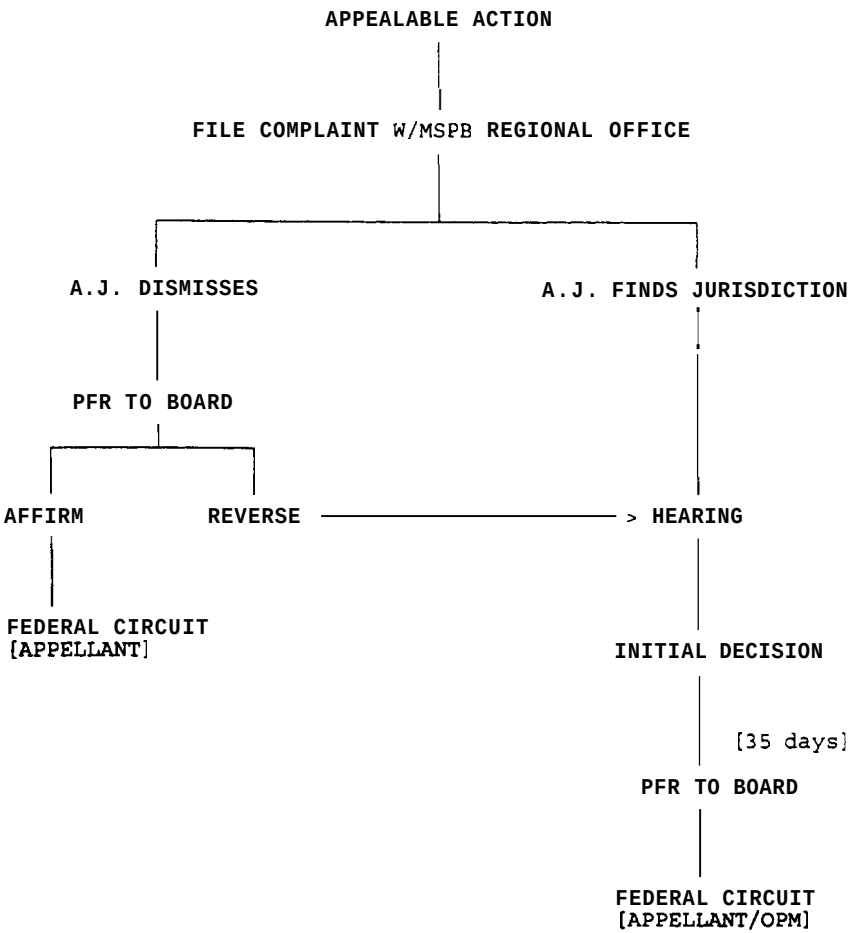
APPENDIX A

PURE DISCRIMINATION COMPLAINTS (CURRENT)

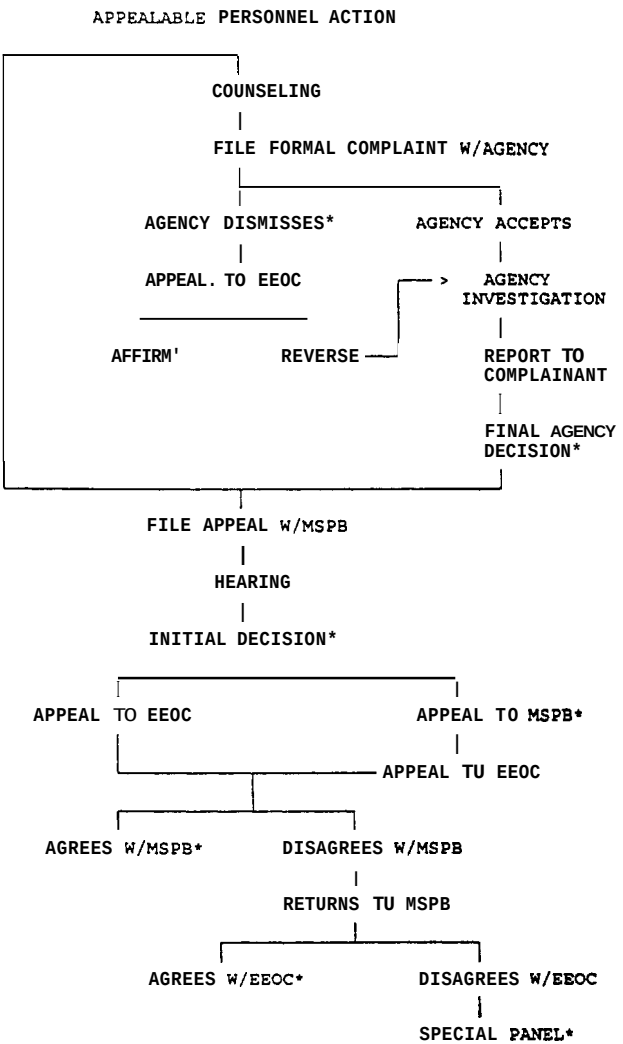


* = complainant may **pursue** civil action **de** novo

PURE MSPB APPEAL (CURRENT AND REVISED)

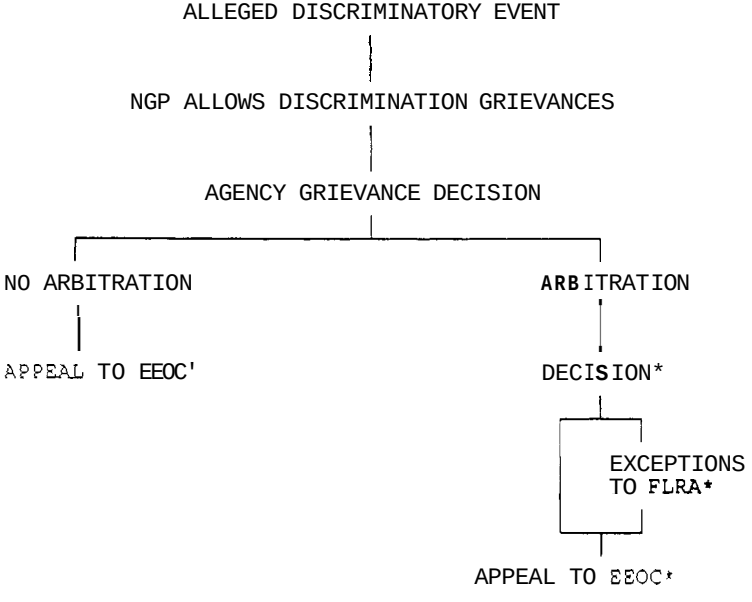


MIXED CASES (CURRENT)



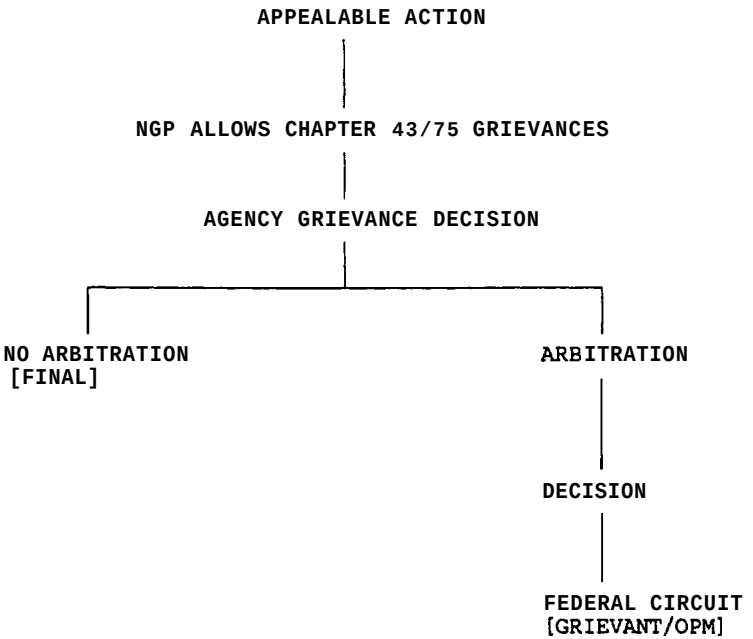
* = complainant may pursue civil action de novo on discrimination **issue**

DISCRIMINATION GRIEVANCES (CURRENT)

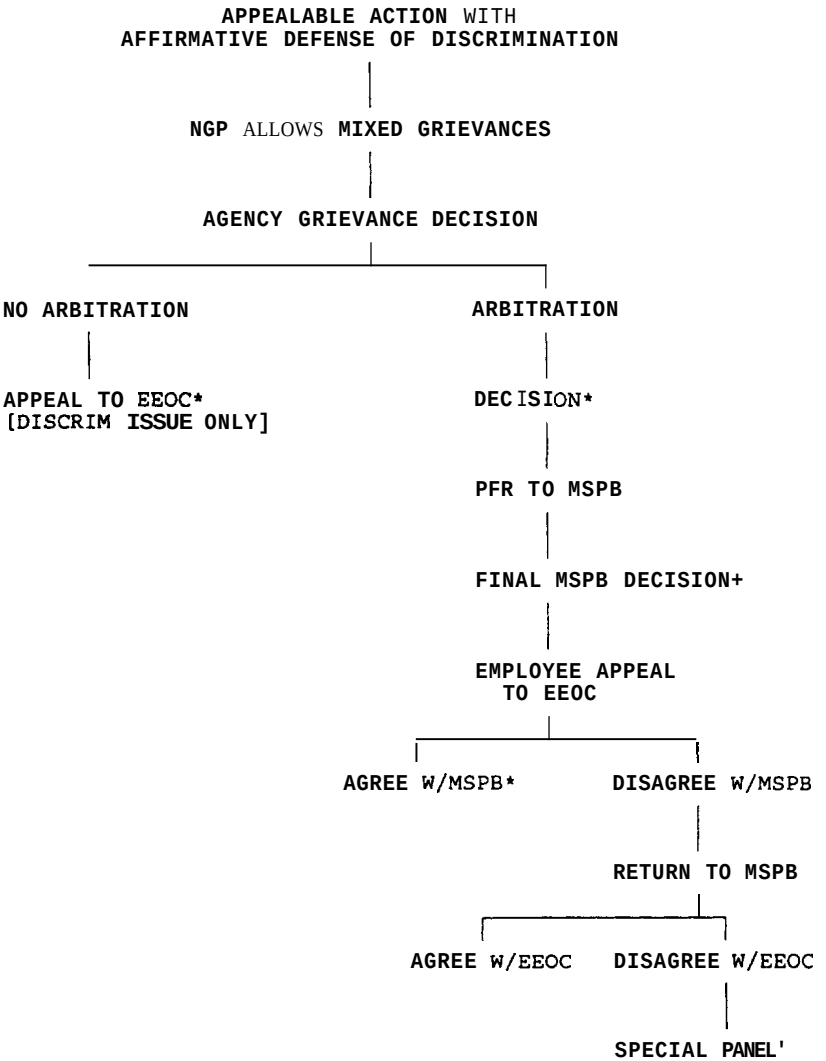


* = complainant may **pursue** civil action de novo

CHAPTER 43/75 GRIEVANCES (CURRENT)

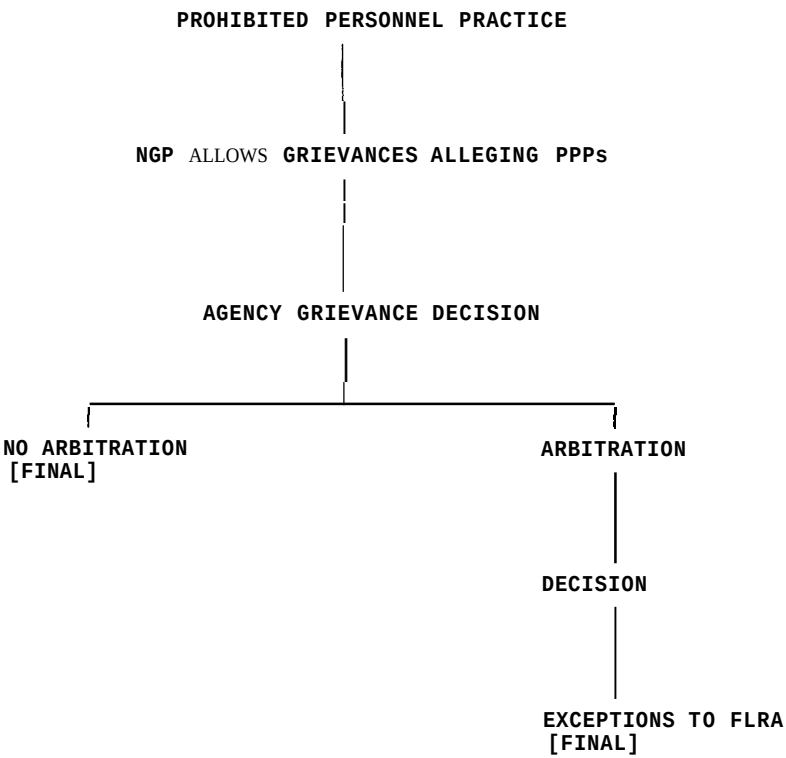


MIXED GRIEVANCES (CURRENT)

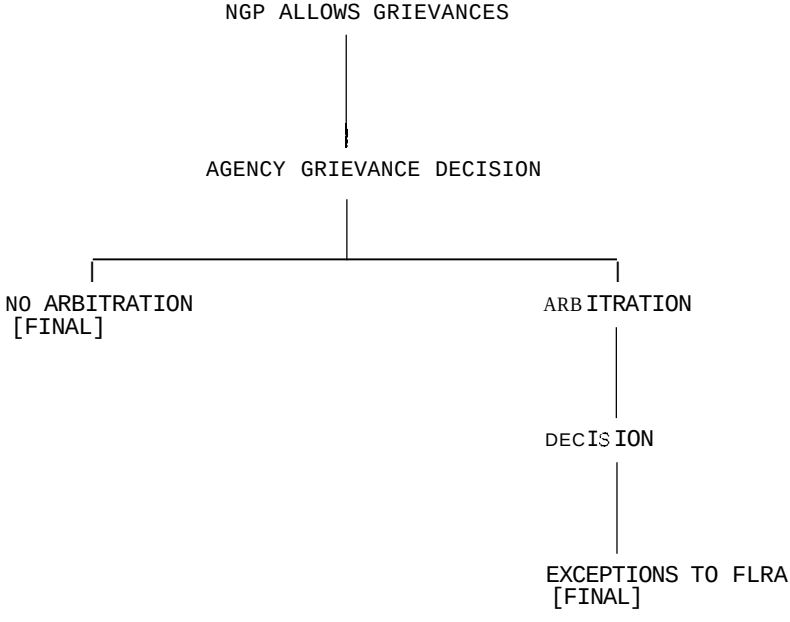


* = grievant may pursue civil action de novo on discrimination issue

GRIEVANCES ALLEGING PPPs OTHER THAN DISCRIMINATION (CURRENT)

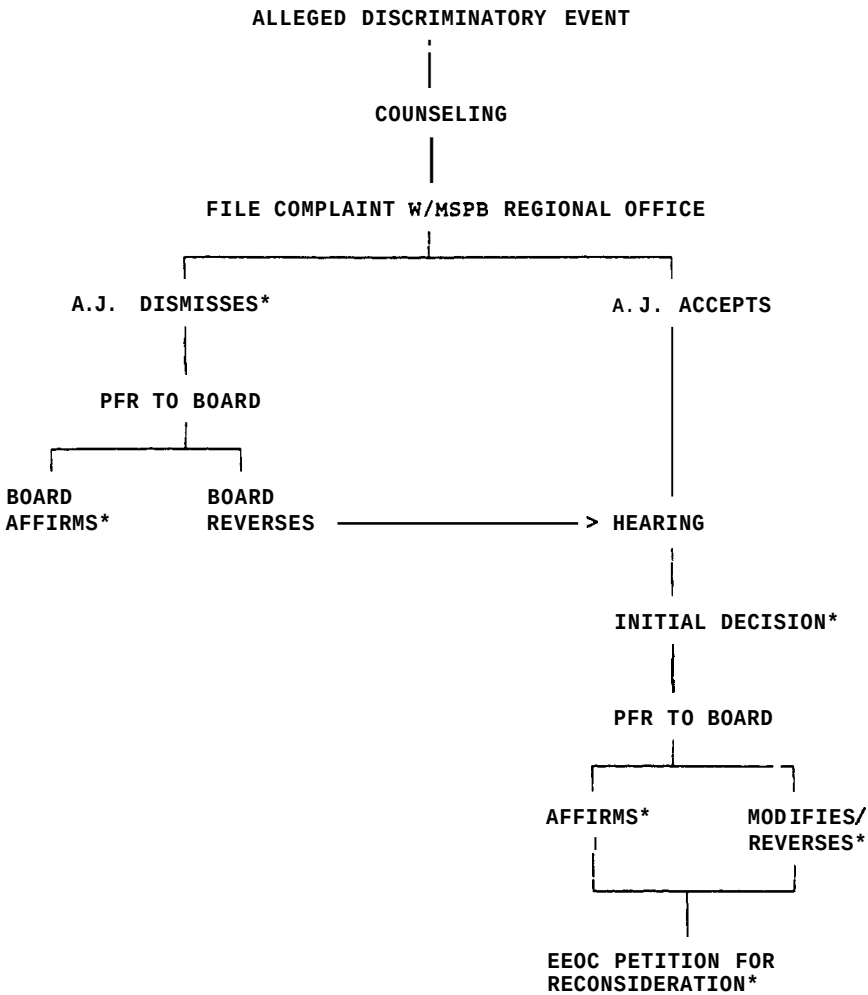


GRIEVANCES INVOLVING OTHER PERSONNEL ACTIONS OTHERWISE WITHIN MSPB APPELLATE JURISDICTION (CURRENT)



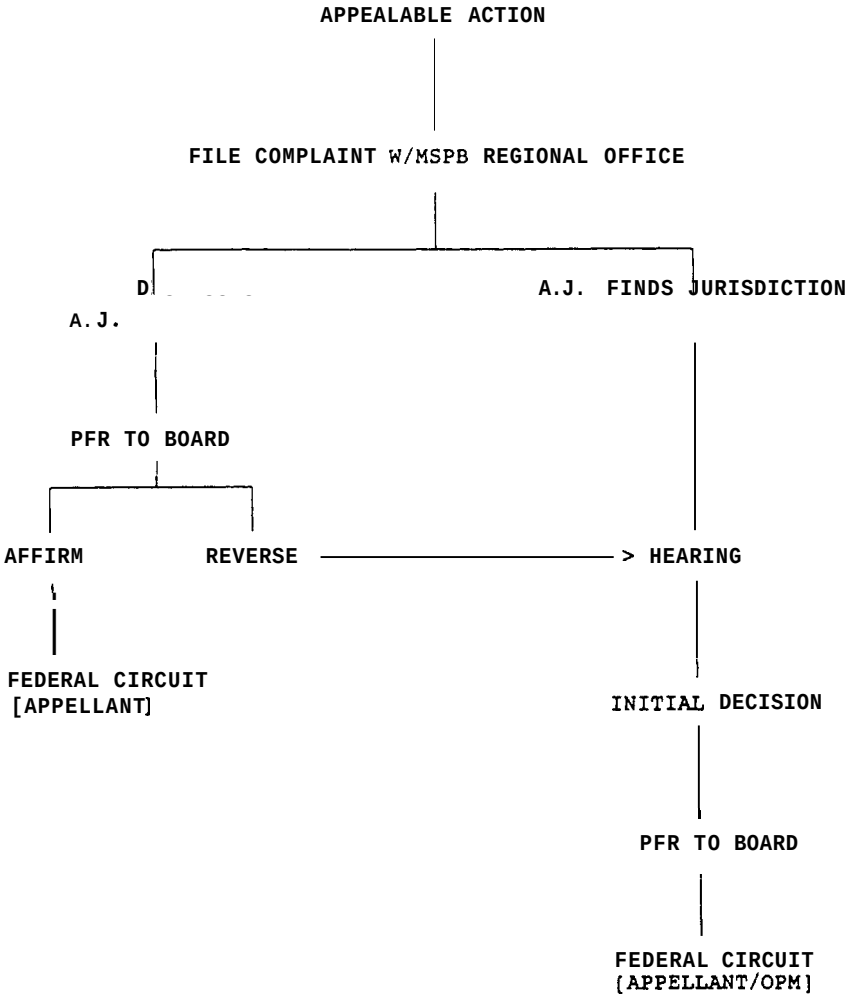
APPENDIX B

PURE DISCRIMINATION CASES (REVISED)

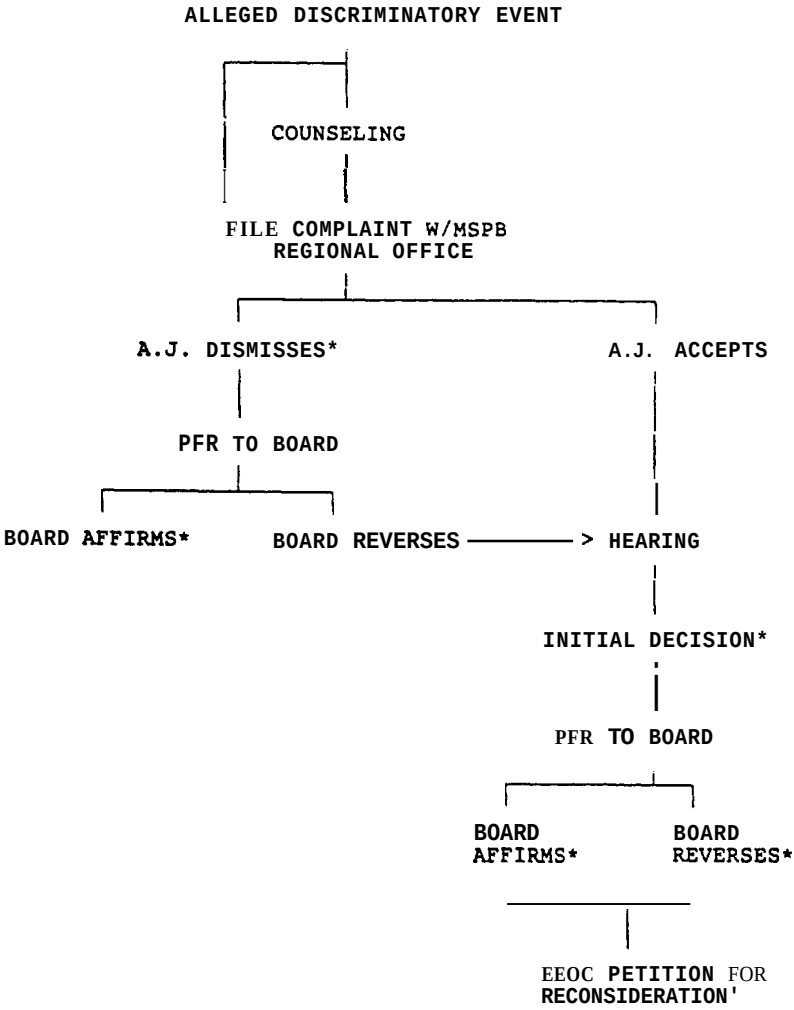


* = complainant may **pursue civil** trial **de novo on** discrimination issue

PURE MSPB APPEAL (CURRENT AND REVISED)

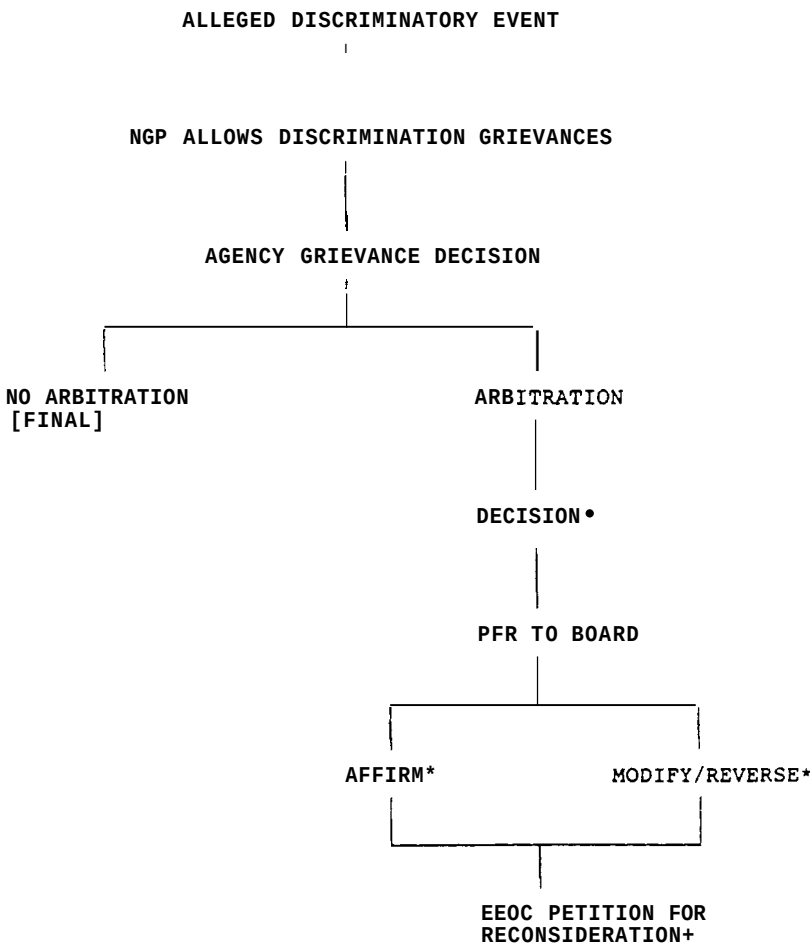


MIXED CASES (REVISED)



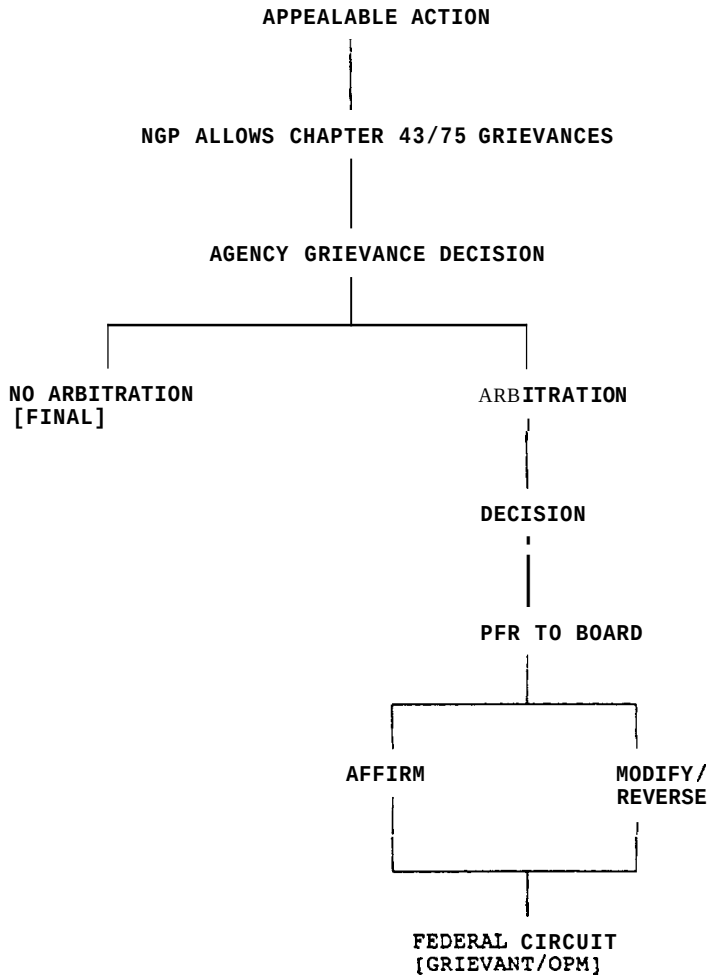
* = appellant may pursue civil trial de novo on discrimination issue and judicial review of MSPB final decision on civil service issue

DISCRIMINATION GRIEVANCES (REVISED)

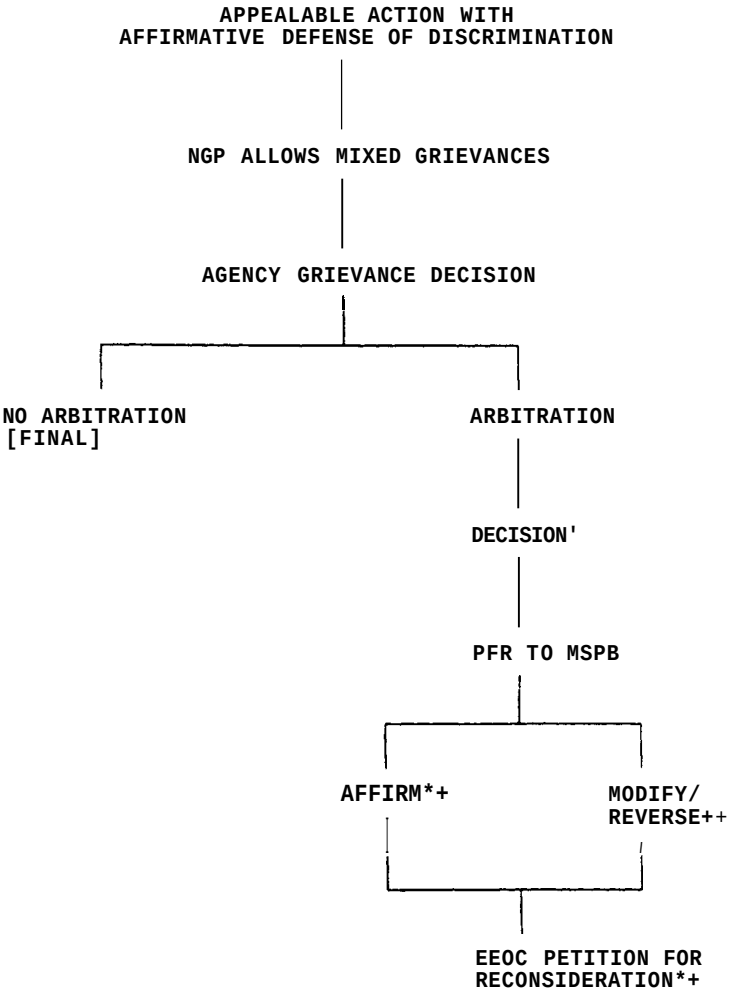


* = grievant may pursue civil trial de novo

CHAPTER 43/75 GRIEVANCES (REVISED)



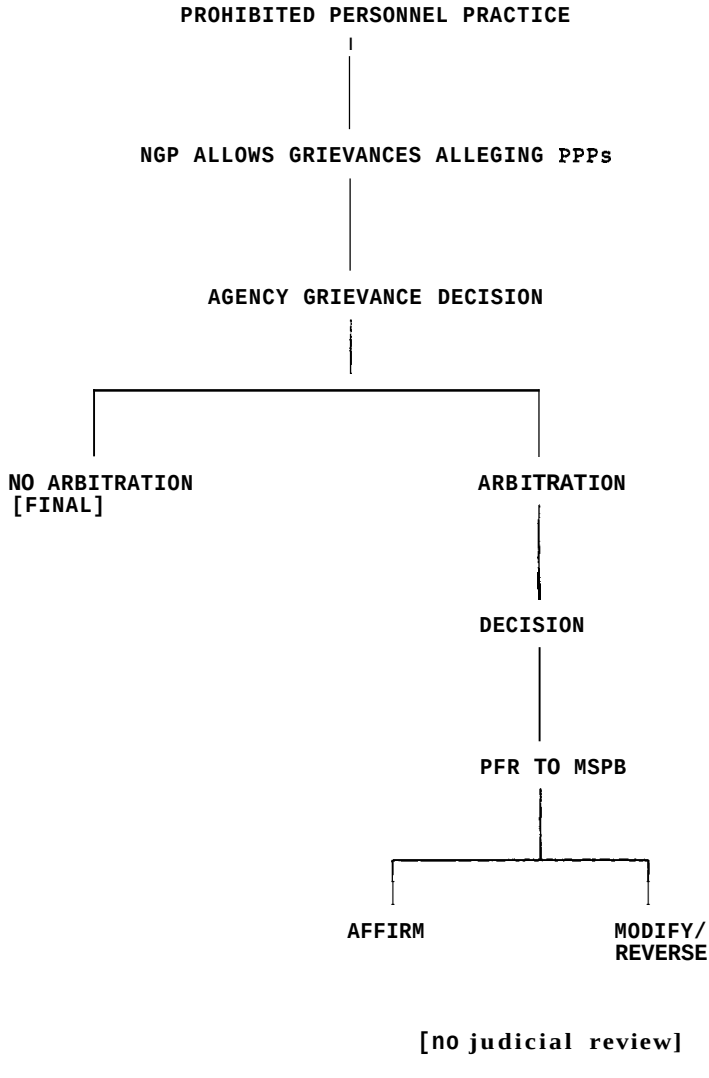
MIXED GRIEVANCES (REVISED)



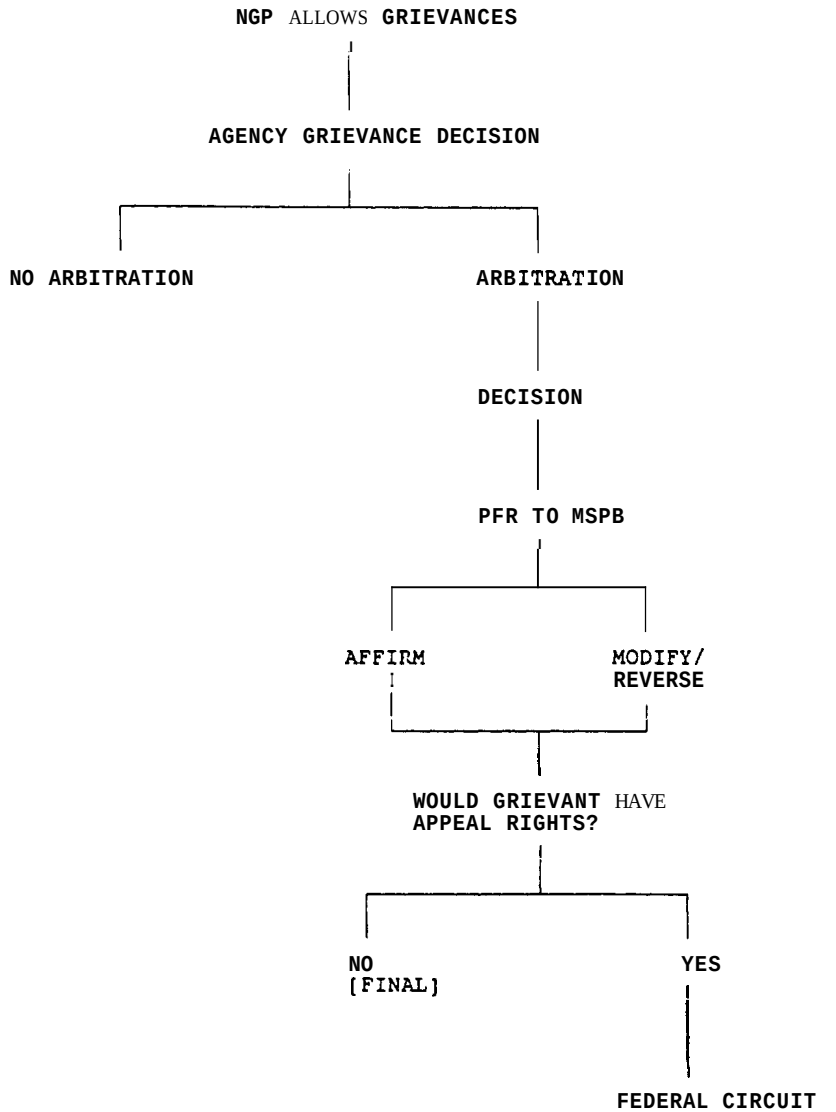
* = grievant may pursue civil **trial** de novo on discrimination issue

t = grievant may obtain judicial review of **MSPB** final decision on civil service issue

GRIEVANCES ALLEGING PPPs OTHER THAN DISCRIMINATION (REVISED)



GRIEVANCES INVOLVING OTHER PERSONNEL ACTIONS OTHERWISE WITHIN MSPB APPELLATE JURISDICTION (REVISED)



MILITARY RULE OF EVIDENCE 404(b): TOOTHLESS GIANT OF THE EVIDENCE WORLD

MAJOR BRUCE D. LANDRUM*

I. Introduction

Rule 404(b) is probably the most frequently litigated rule of evidence.[1] Yet, the evidence that it excludes actually falls within a very narrow range.[2] While the range may be narrow, the rule is a cornerstone of our system of justice.[3] It mandates that we try an accused for the charged crime, not for his life's works. On the other hand, the rule is porous, and frequently the very evidence it purports to exclude, it admits for some other relevant purpose[4]—not a perfect world, but a balancing act.

Now to this arena come new players. Our lawmakers have given us new rules 413 and 414, which in certain cases, allow the one narrow type of evidence that rule 404(b) actually excludes.5 In

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[1] *See* Stephen A. Saltzburg, Trial Tactics: Proper and Improper Handling of Uncharged Crimes, CRIM. JUST., Fall 1991, at 43 ("No rule is invoked more frequently in criminal cases than Fed. R. Evid. 404(b)."); Edward J. Imwinkelried, Uncharged Misconduct Evidence, Part I, CHAMPION, Dec. 1993, at 12 ("In many states, alleged errors in the admission of uncharged misconduct are the most common ground for appeal in criminal cases."); Edward J. Imwinkelried, The Use of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines that Threaten to Engulf the Character Evidence Prohibition, 130 MIL. L. REV. 41, 43 (1990) ("Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules.").

[2] *See* infra text accompanying notes 154-60, 306-30, 387-98.

[3] *See* infra text accompanying notes 12-43, 428-36.

[4] *See* infra text accompanying notes 154-60.

[5] *See* infra text accompanying notes 354-79.

so doing, they have called into question the entire foundation of our criminal justice system.

This article will examine the history of the long-standing prohibition on propensity evidence, and how that history is being altered with the introduction of the new rules. Part II explores the origins of the rule against propensity evidence and its evolution.[6] Part III relates the United States Supreme Court's interpretations of Federal Rule of Evidence 404(b).[7] Part IV examines in detail how the United States Court of Appeals for the Armed Forces[8] has applied Military Rule of Evidence 404(b).[9] Part V introduces the new rules,[10] and Part VI analyzes how the new rules will affect the evidentiary landscape.[11]

II. Origins of the "Uncharged Misconduct" Rule

A. *The Accusatory System v. the Inquisitory System*

The prohibition on using the accused's uncharged acts to prove criminal propensity or disposition has its origins, as does much of our law, in England.[12] Prior to the twelfth century, the primary methods of trial were wager of law, ordeal, and battle.[13] In the twelfth century, Henry II instituted major legal reforms credited with the introduction of the jury trial as the norm in England.[14] He established a permanent court of professional judges, and through his procedural instructions to those judges, was responsible for the emergence of the "inquest" as a procedure available to the public at

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[6] *See infra* text accompanying notes 12-143.

[7] *See infra* text accompanying notes 144-226.

[8] On October 5, 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces. This thesis will use the new name except when referring to a case decided under the old name.

[9] *See infra* text accompanying notes 227-353.

[10] *See infra* text accompanying notes 354-86.

[11] *See infra* text accompanying notes 387-520.

[12] EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:24 (1984 & Supp. 1995); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 991 (1938) [hereinafter Stone, *America*]; Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933) [hereinafter Stone, *England*].

[13] 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF THE ENGLISH LAW 136-50 (2d ed. 1899); 2 *Id.* at 603, 656; 4 WILLIAM BLACKSTONE, COMMENTARIES *414-15; Thomas J. Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidenced in Federal Criminal Dials*, 50 U. CIN. L. REV. 713, 715 (1981).

[14] 1 POLLOCK & MAITLAND, *supra* note 13, at 138, 144, 149-50.

large.[15] This inquest was the forerunner of the trial by jury as we know it. Pollock and Maitland trace the origins of the inquest to the Frankish kings, who used it to bypass the formalistic legal procedures of the day (such as the ordeal) and to actually give them "short cuts to the truth."[16] The Frankish kings apparently modeled this inquest after procedures employed by ancient Roman law.[17]

While the early English law had developed an accusatory system,[18] the difficulty of obtaining convictions under this system had led to widespread use of inquisitorial proceedings.[19] The ecclesiastical courts pursuing heretics in the twelfth and thirteenth centuries were especially fond of the inquisitorial approach.[20] According to Pollock and Maitland: "Every safeguard of innocence was abolished or disregarded; torture was freely used. Everything seems to be done that can possibly be done to secure a conviction."[21] But the twelfth century reforms of Henry II had prevented the inquisition from taking firm hold in the secular English courts.[22]

That Henry II had chosen the accusatory path over the inquisitory path did not stop later English monarchs from using an inquisitorial proceeding in their own Court of Star Chamber, where they tried their enemies for treason or any other breach of state orders.[23]

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[15] *Id.* at 136-38.

[16] *Id.* at 140-41.

[17] *Id.*

[18] 2 *Id.* at 656-58. An accusatory system is one in which the court only tries the charge or pleading placed before it. In contrast, an inquisitorial system gives the court broad powers to inquire into any matter in a search for the truth. BLACK'S LAW DICTIONARY 22 (6th ed. 1990) (defining "accusatory procedure" as the "System of American jurisprudence in which the government accuses and bears the burden of proving the guilt of a person for a crime; to be distinguished from inquisitorial system.") In the early English law two inquests were used, one to indict (like our grand juries) and the other to try the case. Thus, the second inquest was limited in the matters it could consider. 2 POLLOCK & MAITLAND, supra note 13, at 648-49, 656-58. Initially the same inquest was used for both indictment and trial, but as the desire for impartiality grew, the accused was given the right be tried by a different inquest. Zd. at 648-49. Some commentators have noted the inquisitorial nature of the early jury system. See, *e.g.*, Glen Weissenberger, *Making* Sense of Extrinsic *Act* Evidence: *Federal* Rule of *Evidence 404(b),* 70 IOWA L. REV. 579, 583 n.17 (1985). This is a valid observation, but it uses the word "inquisitorial" in a different sense. While the inquest may have been inquisitorial as opposed to adversarial, the accusatory system of only trying the indictment placed before it distinguished it from the more inquisitorial proceedings of the ecclesiastical courts.

[19] 2 POLLOCK & MAITLAND, supra note 13, at 656.

[20] *Id.* at 657.

[21] *Id.*

[22] *Id.* at 658.

[23] 4 BLACKSTONE, supra note 13, at *263; IMWINKELRIED, supra note 12, § 2:24; Reed, supra note 13, at 716-17.

While the Star Chamber had ancient origins, it was "new-modelled" by Henry VII as a device to extort money from his subjects and increase his wealth.[24] In these proceedings, the jury was discarded in favor of a panel of royal justices, and the prosecutor proved the unspecified charges with witness affidavits given in advance, and out of the presence of the accused.[25] The accused had no opportunity to confront his accusers, and very little opportunity to present any defense at all, due to the trial by ambush that usually occurred.[26]

While Charles I abolished the Court of Star Chamber shortly before rebellion broke out in England over these and other abuses, its evils were not soon forgotten.27 One of the reforms Parliament later enacted to respond to such abuses was the Treason Act of 1695.[28] In addition to giving the accused the right to advance notice of the charges, this law also limited the proof at trial to only the acts charged.[29] The primary purpose of the exclusion of uncharged acts was apparently to prevent trial by ambush. This rule is the earliest indication of any codified limit on proving the accused's uncharged misconduct.30

That rules limiting trial evidence did not exist prior to this time is not surprising. When the jury trial began it was a much different institution than the one we know today. In early times the jury had to be drawn from the neighborhood where the cause of action arose.[31] The jurors investigated the facts before trial and could hear the stories of the litigants.[32] In a sense the jurors were witnesses as well.[33] According to Blackstone the jury was "supposed to know before-hand the ***characters*** of the parties and witnesses.. .."[34]

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[24] 4 BLACKSTONE, *supm* note 13, at *422 ('To this end [(amassing wealth)] the court of star-chamber was new-modelled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject.").

[25] *Id.* at *263; Reed, *supra* note 13, at 716.

[26] Reed, *supra* note 13, at 716-17.

[27] 4 BLACKSTONE, *supra* note 13, at *430.

[28] *Id.* at *433; Reed, *supra* note *13,* at 717; IMWINKELRIED, *supra* note 12, § 2:24.

[29] An Act for Regulating of Trials in Cases of Treason and Misprision of Treason (Treason Act of 1695), 7 Will. 3, ch. 3, § 8 ('And it be further enacted, That no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever."), cited in 4 BLACKSTONE, *supra* note 13, at *350; Reed, *supm* note 13, at 717; Stone, England, *supra* note 12, at 958. Blackstone paraphrased the statute but preserved the meaning.

[30] Stone, *England, supra* note 12, at 958; Reed, *supra* note 13, at 716-17. Wigmore cites two earlier cases that held uncharged acts inadmissible in cases other than treason. 1A JOHN H. WIGMORE, EVIDENCE § 58.2, at 1213 nn.1-2 (Peter Tillers rev. 1983) (citing Hampden's Trial, 9 How. St. Tr. 1053, 1103 (K.B. 1684) and Harrison's Trial, 12 How. St. Tr. 833, 864 (Old Bailey 1692)).

[31] 3 BLACKSTONE, *supra* note 13, at *359.

[32] 2 POLLOCK & MAITLAND, *supm* note 13, at 627.

[33] *Id.*

[34] 3 BLACKSTONE, *supra* note 13, at *359 (emphasis added).

Pollock and Maitland summed up the situation saying: "On the whole, trial by jury must have been in the main a trial by general repute."[35] Any rule excluding evidence would have served no purpose in that type of jury trial.

According to Blackstone, the English law recognized the key defect of this system and, over time, corrected it.[36] While knowing the parties helped jurors decide how much credit to give their stories, the problem was that jurors might act on their prejudices and partialities instead of on facts.[37] As jury impartiality became more important, the requirement of neighborhood jurors was gradually relaxed and finally totally abolished.[38] Only with the advent of impartial juries would an exclusionary rule have any real impact. Perhaps that Blackstone in 1768 identified jury bias and partiality as a defect in the English system39 influenced later courts to increasingly apply just such a rule.

In time, the exclusionary rule first codified in the Treason Act became the norm in trials other than for treason as well.[40] Legal authorities seemed to recognize it as a requirement of basic due process and fairness.[41] But the rule was much more limited than it appeared to be on its face. Courts often held the rule did not apply to uncharged acts that were relevant to prove the charged acts.[42] In effect then, this was really no more than a rule excluding irrelevant evidence.43 But through the development of the common law, it became much more.

B. The Early Cases

Professor Stone's two articles on the exclusion of similar fact evidence in England and America, at the time he wrote them, represented the most authoritative effort to trace the development of the uncharged misconduct rule from its origins.[44] Despite his exhaustive

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[35]2 POLLOCK & MAITLAND, *supra* note 13, at 655.

[36]3 BLACKSTONE, *supra* note 13, at *360.

[37]*Id.*

[38]*Id.*

[39]*Id.* at *383.

[40]Reed, *supra* note 13, at 717; Stone, *England, supra* note 12, at 958-59. Some courts had applied the rule in nontreason cases even before the Treason Act became law. *See supra* note 30.

[41]Reed, *supra* note 13, at 717.

[42]Stone, *England, supra* note 12, at 958.

[43]*Id.* at 959.

[44]Stone, *America, supra* note 12; Stone, *England, supra* note 12; IMWINKELRIED, *supra* note 12, § 2:26; Norman Krivosha et al., *Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts To Convict,* 60 NEB. L. REV. 657, 662 (1981); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, "TRUTH IN CRIMINAL JUSTICE" SERIES, REPORT No. 4, *The Admission of Criminal Histories at Trial* (1986) [hereinafter DOJ REPORT], *reprinted in* 22 U. MICH. J.L. REF. 707,718 (1989).

research, he could only trace the rule against proving criminal propensity with uncharged misconduct evidence to an apparently unpublished case noted in an evidence treatise.[45] In that 1810 case, ***Rex v. Cole,*** the court held that "in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be admitted."[46] This report of the decision, said Stone, was "the one unchallenged starting-point for **all** the nineteenth century decisions."[47]

While many of the cases and commentators of later years seemed to recognize a broad rule excluding all evidence of an accused's past misdeeds unless an exception applied, few cases prior to 1850 stated such a rule.[48] Instead, most of the cases admitted uncharged misconduct evidence on theories of relevance other than propensity, a practice not forbidden by the ***Rex v. Cole*** rule.[49] The rule until that time appeared to be an inclusionary rule, admitting the evidence for any relevant purpose unless the sole purpose was to prove propensity to commit the crime.[50]

After 1850, however, the cases began to shift toward an exclusionary rule with limited exceptions.[51] As courts would issue opinions explaining their alternative theories of nonpropensity relevance, they tended to list the examples found in the case law to date.[52] Through the natural practice of the common law to look for precedent, some courts tended to crystallize the relevant purposes for the use of uncharged misconduct into the list they were able to find in the cases.[53] Over time, courts began to regard this list as exclusive of other new relevant purposes.[54] On the other hand,

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[45] Stone, England, supra note 12, at 959. Prior cases had held uncharged misconduct inadmissible, apparently on the theory that it was irrelevant, but none had explicitly stated a rule that relevant propensity evidence should be inadmissible. ***See*** supra note 30.

[46] Stone, England, supra note 12, at 959 (quoting SAMUEL M. PHILLIPS, LAW OF EVIDENCE 69-70 (1814)). In a later edition, Phillips cited the case as "Rex v. Cole, Mich. term 1810, by all the judges, MS," but I also have been unable to locate any other report of the case. SAMUEL M. PHILLIPS, LAW OF EVIDENCE 143 n.3 (New York, Gould 3d Am. ed. 1823). ("Phillips" also has been spelled "Phillipps" and both spellings appear on these books in various places.)

[47] Stone, England, supra note 12, at 959.

[48] *Id.* at 965.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 966; IMWINKELRIED, supra note 12, § 2:25.

[52] Stone, England, supra note 12, at 966-73.

[53] *Id.* at 966.

[54] *Id.* at 966-73.

many cases decided during this period still applied the inclusionary rule, so the actual state of the law in England was unsettled.55

In 1894, the case of *Makin v.* Attorney General *of* New *South Wales*[56] clarified the English rule. In the Makins' trial for murdering an infant in their care and burying the body in the back yard, the prosecutor used evidence that the bodies of other infants had been found buried at their three previous residences.57 Along with evidence of prior similar cases of women entrusting their children to the Makins as adoptive parents and never seeing the children again, this evidence was held relevant to the issues of the Makins' intent in adopting the child and whether or not the death was accidental.58

On appeal, the Privy Council stated the prohibition on proving uncharged crimes to show "the accused is a person likely from his criminal conduct or character to have committed the offence. . . ." [59] But the decision also stated that such evidence was not automatically inadmissible if "relevant to an issue before the jury" such as the issue of accident "or to rebut a defence which would otherwise be open to the accused."[60] This open-ended escape clause from the uncharged misconduct prohibition clearly established the inclusionary rule in England.[61] Despite the fact that some courts misinterpreted *Makin* in the years that followed, the vast majority have cited the decision for the proposition that the list of so-called "exceptions" is merely illustrative and not exhaustive.62

As for the American rule, our courts drew heavily from the English decisions, and until the beginning of this century, generally followed the same path.[63] In 1901, the case of People *v. Molineux*[64] marked the divergence of the paths.[65] In Molineux's murder trial, the prosecution alleged that he had sent a poisoned box of "bromo seltzer" to Harry Cornish, his intended victim, who had then acci-

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[55] *Id.* at 970; IMWINKELRIED, *supra* note 12, § 2:25; Krivosha et al., *supra* note 44, at 664-65.

[56] 1894 App. Cas. 57 (P.C. 1893). Apparently, the case was decided in 1893, but not reported until the 1894 volume of *Law Reports.*

[57] *Id.* at 58-59, 68.

[58] *Id.* at 68; Stone, *England, supm* note 12, at 974.

[59] *Makin,* 1894 App. Cas. at 65.

[60] *Id.*

[61] Stone, *England, supra* note 12, at 975; IMWINKELRIED, *supra* note 12, § 2:25.

[62] Stone, *England, supra* note 12, at 975.

[63] Stone, *America, supra* note 12, at 989-93; IMWINKELRIED, *supra* note 12, § 2:26; Krivosha et al., *supra* note 44, at 665-67; Reed, *supra* note 13, at 720-23.

[64] 61 N.E. 286 (N.Y. 1901).

[65] Stone, *America, supra* note 12, at 1023; Krivosha et al., *supm* note 44, at 668-69.

dentally poisoned Mrs. Adams, the actual victim.[66] To try to explain the unusual circumstances surrounding this murder, the prosecution used evidence of a similar murder of another of Molineux's enemies two months before.[67] The New York Court of Appeals reversed the conviction, unanimously holding the evidence should not have been admitted.68

The four judges joining the lead opinion viewed the evidence as inadmissible uncharged misconduct.[69] The three judges joining the minority opinion viewed the evidence as potentially relevant to a nonpropensity purpose, but found a fatal lack of proof that Molineux was responsible for the first murder.[70] The lead opinion, while admitting that the exceptions "cannot be stated with categorical precision," nevertheless espoused the exclusionary approach to the uncharged misconduct rule.[71] It stated the general rule of exclusion and then listed five recognized exceptions: to prove motive; intent; absence of mistake or accident; common scheme or plan; and identity.[72] Contrary to what was happening in England, this opinion shifted the direction of many American jurisdictions toward the exclusionary rule.[73] It also inspired the familiar "MIMIC"[74] mnemonic for pigeon holing uncharged misconduct evidence admissible for nonpropensity purposes.[75]

While the majority of states adopted the exclusionary approach to uncharged misconduct, a solid minority always retained the inclusionary approach.[76] The federal approach never really became settled. In the 1918 case of Greer *v.* United *States,*[77] Justice Holmes made clear that federal evidence law followed the common law rule that the prosecution could not prove the character of the accused unless the defense opened the door to it.[78] Thirty years later, in Michelson v. United *States*,[79] Justice Jackson was more specific in

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[66] *Molineux*, 61 N.E. at 287.

[67] *Id.* at 289-91.

[68] *Id.* at 310-12.

[69] *Id.* at 303.

[70] *Id.* at 312.

[71] *Id.* at 294.

[72] *Id.*

[73] Stone, *America*, *supra* note 12, at 1023; Krivosha et al., *supra* note 44, at 669; IMWINKELRIED, *supra* note 12, § 2:27.

[74] "MIMIC" stands for: Motive, Intent, absence of Mistake or accident, Identity, and Common scheme or plan.

[75] IMWINKELRIED, *supra* note 12, § 2:27.

[76] *Id.* §§ 2:27, 2:29.

[77] 245 U.S. 559 (1918).

[78] *Id.* at 560.

[79] 335 U.S. 469 (1948).

stating that this prohibition included proving character by uncharged misconduct.80

The real issue in *Michelson* was the propriety of the prosecutor cross-examining defense character witnesses on whether or not they had heard about a prior arrest.[81] In arriving at the decision of that issue, however, the Court reviewed the state of the law regarding character evidence as a whole:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.[82]

In a footnote, the opinion discussed the "well-established exceptions" to this general rule and cited examples, giving the opinion the definite appearance of an exclusionary approach.[83] The reason for the exclusion was not because the uncharged misconduct was irrelevant, but because it tended to cause "confusion of issues, unfair surprise and undue prejudice."[84] Ultimately, the Court held that allowing cross-examination about the prior arrest was within the discretion of the trial judge.[85] Because the defense had "opened the door" by presenting character evidence, the defendant had no valid complaint about the prosecution being able to rebut it.[86]

While the majority opinion appeared to state an exclusionary approach to uncharged misconduct in the prosecution case-in-chief, it took an inclusionary approach in the area of rebuttal. This, the Court said, was based primarily on the common law of character evidence developed primarily in the various state courts.[87] In a short concurring opinion, Justice Frankfurter struck a blow for applying the inclusionary approach across the board: "I believe it to be unprofitable, on balance, for appellate courts to formulate rigid rules for the exclusion of evidence in courts of law that outside them would not be regarded as clearly irrelevant in the determination of

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[80] *Id.* at 475-76.
[81] *Id.* at 472.
[82] *Id.* at 475 (footnote omitted).
[83] *Id.* at 475 n.8.
[84] *Id.* at 476.
[85] *Id.* at 486-87.
[86] *Id.* at 485.
[87] *Id.* at 486-87.

issues."[88] Perhaps this logically appealing statement foreshadowed the current trend back toward the inclusionary view.

Justice Rutledge, on the other hand, dissented, arguing for a more exclusionary approach to rebuttal evidence.[89] In his review of character evidence law, he also harkened back to the common law roots of the system:

> Imperfect and variable as the scheme has become in the application of specific rules, on the whole it represents the result of centuries of common-law growth in the seeking of English-speaking peoples for fair play in the trial of crime and other causes. . . . Our whole tradition is that a man can be punished by criminal sanctions only for specific acts defined beforehand to be criminal, not for general misconduct or bearing a reputation for such misconduct. That tradition lies at the heart of our criminal process. And it is the foundation of the rule of evidence which denies to the prosecution the right to show generally or by specific details that a defendant bears a bad general estimate in his community.[90]

Despite the prevalence of the exclusionary view of the uncharged misconduct rule in the first half of this century, the inclusionary approach began to make a comeback,[91] probably due, at least in part, to Professor Stone's persuasively written article in which he dubbed the exclusionary approach as "the Spurious Rule."[92] The 1973 case of *United States v. Woods*,[93] though only representing the law in one federal circuit, illustrates the inclusionary trend in federal evidence law. Martha Woods was charged with murdering her infant foster son by smothering him.[94] The government forensic pathologist was only seventy-five percent sure the death was a homicide.[95] To prove homicide, the prosecution proved that nine other children, seven of whom had died, had experienced at least twenty episodes of respiratory difficulties[96] while in the care or control of the defendant.[97]

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[88] *Id.* at 487.

[89] *Id.* at 488-96.

[90] *Id.* at 489-90.

[91] *See* IMWINKELRIED, *supra* note 12, § 2:29.

[92] Stone, *America*, *supra* note 12, at 1000. *See* DOJ REPORT, *supra* note 44, *reprinted in* 22 U. MICH. J.L. REF. 707, at 718.

[93] 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

[94] *Id.* at 128-30.

[95] *Id.* at 130.

[96] The United States Court of Appeals for the Fourth Circuit (Fourth Circuit) used the term "cyanosis" and defined this as "a blue color, principally around the lips, due to a *lack* of oxygen." *Id.* at 129-30.

[97] *Id.* at 130.

In upholding the use of this uncharged misconduct evidence, the Fourth Circuit first stated the clear relevance of the prior acts to prove that the death was a homicide and that Mrs. Woods was the perpetrator.[98] In the Fourth Circuit's view, the evidence concerning all ten children, considered together, made any other conclusion totally improbable. The Fourth Circuit also cited the necessity of using evidence of repeated incidents in child abuse cases, where the defenseless victim cannot testify, as making the evidence "especially relevant."[99] As for the general prohibition on uncharged misconduct evidence, the Fourth Circuit examined the exceptions the government had argued and concluded that the "accident" and "signature" exceptions applied.[100] But the Fourth Circuit also stated that trying to fit the evidence into a recognized exception was "too mechanistic an approach," and proceeded to espouse all four corners of the inclusionary approach to the rule.[101] The Fourth Circuit stated the rule as follows:

> [O]ther offenses may be received, if relevant, for any purpose other than to show a *mere* propensity or disposition on the part of the defendant to commit the crime, provided that the trial judge may exclude the evidence if its probative value is outweighed by the risk that its admission will create a substantial danger of undue prejudice to the accused.[102]

Hence the *Woods* court helped lay the groundwork for the ultimate adoption of this type of inclusionary rule as part of the Federal Rules of Evidence in 1975.

Both the English and American rules, whether inclusionary or exclusionary, recognized the basic principle that uncharged misconduct could not be proven *solely* to show propensity to commit crime. Yet in a small category of cases, "unnatural offenses," an exception to even this bedrock principle developed in some jurisdictions.[103] The theory was that the propensity to commit certain types of offenses — generally indecent acts with children — is so rare that if a person has shown it, that propensity is more of a "physical peculiari-

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[98] *Id.* at 133.

[99] *Id.*

[100] *Id.* at 134.

[101] *Id.*

[102] *Id.* (emphasis added). If this rule sounds very *similar* to the Federal Rules of Evidence 402-404 that ultimately were adopted, this is no coincidence. The Fourth Circuit cited the proposed rules in a footnote. *Id.* at 134 n.9.

[103] *See* Julius Stone, *Propensity Evidence in Trials for Unnatural Offences*, 15 AUSTL. L. J. 131 (1941); Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127 (1993).

ty" than a general criminal propensity.[104] This exception has come to be known as the "lustful disposition rule" in some jurisdictions and has been extended to cover other sex offenses that probably would not meet the original definition of "unnatural offenses."[105] While the logic of the theory seems instinctively appealing, the idea that certain types of crimes are more likely to be repeated than others has been criticized as spurious.[106] Nevertheless, this common law exception undoubtedly played a role in the genesis of the new Federal Rules of Evidence that allow just such evidence.

C. The Early Codifications

Because the law was unsettled in this country as to which view of the uncharged misconduct rule was correct, several states codified various versions of the rule.[107] As early as 1923, the American Law Institute had considered restating the Law of Evidence, but the idea was rejected as unfeasible due to the case law conflicts between states and even within states.[108] Perhaps more importantly, the council of the Institute considered the rules of evidence, as they existed then, to be counter-productive in many ways to the goal of finding the truth.[109] But after the 1938 debut of the Federal Rules of

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[104] Stone, *supra* note 103, at 133.

[105] Reed, *supra* note 103, at 168-69. Professor Reed's article provides a thorough review of the history and development of the "lustful disposition rule" in the various English and American jurisdictions. He cites State v. Ferrand, 27 So. 2d 174, 178 (La. 1946), as the source of the name of the rule, but also notes that other similar names have been used. Reed, *supra* note 103, at 168 n.230 (citing Woods v. State, 235 N.E.2d 479, 486 (Ind. 1968) (the 'depraved sexual instinct" rule) and State v. Schut, 429 P.2d 126, 128 (Wash. 1967) (the "lustful inclination" rule)). While some jurisdictions have limited the rule to proof of uncharged sex acts with the same victim, others have extended the rule to proof of any prior (or later) similar sex acts with any victim. *Id.* at 176.

[106] Reed, *supra* note 103, at 159 n.181. Professor Reed also reviews the validity of "lustful disposition" inferences based on empirical evidence. He concludes that, while many courts have presumed the value of prior rape evidence in predicting a later rape, the assumption that rapists are sexual psychopaths is unfounded. Research indicates that rapists tend to be violent, and prior rapes are more a predictor of future violence than of future sex crimes. *Id.* at 147-50 (citing Joseph J. Romero & Linda M. Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Follow Up Study*, FED. PROBATION, Mar. 1985). *See infra* note 494. Child molesters, on the other hand, tend to have a higher recidivism rate than previous studies have shown, but no higher than for other crimes. The under reporting of those types of crimes has artificially reduced those rates. *Id.* at 149 n.117, 150-53 (citing A. Nicholas Groth et al., *Undetected Recidivism among Rapists and Child Molesters, 28* CRIME & DELINQUENCY 450 (1982)). *See infra* notes 467, 492.

[107] IMWINKELRIED, *supra* note 12, § 2:28.

[108] NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *Commissioners' Prefatory Note* to UNIF. R. EVID. (1974) [hereinafter UNIF. R. EVID. *Prefatory Note*].

[109] *Id.*

Civil Procedure, many of which deal with evidentiary issues, interest in codifying the rules of evidence grew.[110] In 1939, the American Law Institute began work on the Model Code of Evidence, promulgating it in 1942.[111] Model Code of Evidence, Rule 311, dealt with the issue of uncharged misconduct by providing that:

> [Elvidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.[112]

The drafters apparently included the "if, but only if' language of this rule to make crystal clear to courts interpreting it that it prohibited only one very narrow use of uncharged misconduct evidence, an inclusionary approach.

In 1948, the National Conference of Commissioners on Uniform State Laws decided that Evidence Law was an appropriate topic for a uniform act.[113] After studying the Model Code of Evidence, among other materials, the commissioners promulgated the Uniform Rules of Evidence in 1953.114 Uniform Rule of Evidence **55,** which covered the handling of uncharged misconduct evidence, read as follows:

> [Elvidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his disposition to commit crime or civil wrong. . . on another specified occasion, but . . . such evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge, or identity.[115]

While less clearly inclusionary, this rule more closely resembles the ultimately adopted Federal Rule of Evidence 404(b) in that it states a general prohibition, but then gives a nonexhaustive list of situations to which the general prohibition would not apply,

D. Federal Rule of Evidence 404(b)

In 1961, the Judicial Conference of the United States established a special committee to determine the feasibility of creating

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[110] *Id.*

[111] *Id.*

[112] MODEL CODE OF EVIDENCE Rule 311 (1942), *reprinted in* IMWINKELRIED, *supra* note 12, § 2:28.

[113] UNIF. R. EVID. *Prefatory Note, supra* note 108.

[114] *Id.*

[115] UNIF. R. E m . 55 (1953), *reprinted in* IMWINKELRIED, *supra* note 12, § 2:28.

uniform evidence rules for federal courts.[116] This committee recommended uniform rules in 1962,[117] and in 1965, Chief Justice Warren appointed an Advisory Committee to begin drafting.[118] Not until 1969 did the Advisory Committee circulate its Preliminary Draft.[119] After the Revised Draft circulated in 1971, the Supreme Court sent the rules to Congress for enactment in 1972.[120] After some congressional modifications, the Federal Rules of Evidence for United States Courts and Magistrates became law, effective July 1, 1975.[121]

These Federal Rules of Evidence contained the provision that many a trial practitioner has come to know and love, Rule 404(b):

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[122]

In 1991, the final period was changed to a comma and the following language was added at the end:

> provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.[123]

The use of the words "such as" in the second sentence indicates that the list of admissible purposes given here is merely exemplary and nonexhaustive. The legislative history also amply demonstrates that the intent of this rule is to admit more uncharged misconduct evidence than the old exclusionary approach.[124] Despite its apparently inclusionary formulation, however, some courts have treated this rule's list of admissible purposes as an exclusive list of exceptions to the broad exclusionary rule.[125] But most of the federal

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[116]UNIF. R. EVID. *Prefatory* ***Note, supra*** note 108.

[117]*Id.*

[118]Edward W. Cleary, Introduction to FED. R. EVID. (West 1987).

[119]*Id.*

[120]*Id.*

[121]Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (establishing rules of evidence for certain courts and proceedings).

[122]FED. R. EVID. 404(b).

[123]*Id.* (1991 amendment).

[124]IMWINKELRIED, ***supra*** note 12, § 2:30.

[125]*Id.*

courts applying Rule 404(b) today would take the inclusionary view and, subject to Rule 403,[126] admit any uncharged misconduct evidence relevant to any fact in issue other than the propensity of the accused to commit crime.[127]

E. Military Rule of Evidence 404(b)

At the time that the Federal Rules of Evidence were being drafted, the military already had a codified set of evidence rules, found in Chapter XXVII of the ***Manual for Courts-Martial***.[128] The President had promulgated these rules, starting in 1951, within his rule-making authority under Article 36 of the Uniform Code of Military Justice.[129] Paragraph 138g of these rules, entitled "Evidence of other offenses or acts of misconduct of the accused,"[130] for the most part embodied the same type of inclusionary rule that was being incorporated into Rule 404(b).[131] It read as follows:

> The ***general rule*** is that evidence of other offenses or acts of misconduct of the accused is ***not admissible*** as tending to prove his guilt, for ordinarily this evidence would be useful only for the purpose of raising an inference that the accused has a ***disposition*** to do acts of the kind charged or criminal acts in general and, if the disposition thus inferred was to be made the basis for an inference that he did the act charged, the rule forbidding the drawing of an inference of guilt from evidence of the bad moral character of the accused would apply. ***However,*** if evidence of other offenses or acts of misconduct of the accused has substantial value as ***tending to prove something other*** than a fact to be inferred from the disposition of the accused or ***is offered in proper rebuttal*** of matters raised by the defense, the reason for excluding the evidence is not applicable.[132]

This paragraph went on to give some specific examples of admissible and inadmissible purposes for using uncharged misconduct evidence, most of which parallel the examples listed in Federal Rule of

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[126] ***See infra*** text accompanying notes 154-67, 306-32.

[127] IMWINKELRIED, ***supra*** note 12, § 2:30.

[128] MANUAL FOR COURTS-MARTIAL, United states, ch. XXVII (rev. ***ed.*** 1969) [hereinafter 1969 MANUAL].

[129] 10 U.S.C. § 836 (1994); STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL X (3d ed. 1991 & Supp. 1995).

[130] 1969 MANUAL, ***supra*** note 128, ¶ 138g.

[131] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) analysis, app. 22 (1995 ed.) [hereinafter MCM]. ***But see infra*** note 233 and accompanying text.

[132] 1969 MANUAL, ***supra*** note 128, ¶ 138g (emphasis added).

Evidence 404(b), but with much greater detail.[133]

Article 36 of the Uniform Code of Military Justice required the President, "so far as he consider[ed] practicable, [to] apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts."[134] Paragraph 137 of the 1969 *Manual for Courts-Martial* recognized that military evidence rules were drawn from the rules applied in federal courts, and pointed to those rules and the common law as sources for filling gaps in the military rules.[135] So the similarity between the military uncharged misconduct rule and the Federal Rule of Evidence that was in drafting was no coincidence. Even before the Military Rules of Evidence became effective, military judges would have been looking to case law interpreting the new Federal Rule of Evidence 404(b) to fill any gaps in the military rule at paragraph 138g. When the Military Rules of Evidence ultimately took the place of the prior rules in 1980, a certain body of case law and common understanding carried over and was grafted onto the new shorter rule.[136]

While Congress and the Supreme Court were involved in creating the Federal Rules of Evidence, the executive branch alone created the Military Rules of Evidence.[137] This makes little difference in the area of uncharged misconduct, however, because Military Rule of Evidence 404(b) is almost identical to Federal Rule of Evidence 404(b). The only difference is in the recent amendment regarding advance notice to the accused of intent to use 404(b) evidence.[138] The military version of the amendment merely changes some wording to reflect the terminology of military courts.[139]

The similarity between the Federal and Military Rules of Evidence allows military practitioners to rely heavily on federal court precedents on particular rules when no military cases are on point. The reverse should be true as well, but in practice, federal court practitioners might be reluctant to cite military precedents. Another benefit of the similarity flows from Military Rule of

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[133] *Id.* ¶ 138g(1)-(7).

[134] 10 U.S.C. § 836 (1994).

[135] 1969 MANUAL, *supra* note 128, ¶ 137.

[136] *See* MCM, *supra* note 131, MIL. R. EVID. 404(b) analysis, app. 22 ("Rule 404(b) provides examples rather than a list of justifications for admission of evidence of other misconduct. Other justifications . . . expressly permitted in *Manual* ¶ 138g . . . remain effective.").

[137] SALTZBURG ET AL., *supra* note 129, at x-xi.

[138] MCM, *supra* note 131, MIL. R. EVID. 404(b) analysis, app. 22.

[139] *Id.* (1994 amendment). Specifically, the military version omits the words "in a criminal case," which is logical because that is the only kind of case the military tries under its rules, and it changes the word "court" to "military judge."

Evidence 1102 which states that:

> Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 180 days after the effective date of such amendments unless action to the contrary is taken by the President.[140]

This automatic incorporation of amendments to the Federal Rules of Evidence allows the rules to change quickly, without the need for a cumbersome executive order drafting process, to develop in accord with the rules being used in federal courts generally.[141] But it also allows a six-month period in which the military can propose modifications to the President to adapt the changes to the needs of military practice.[142] This automatic incorporation procedure was the avenue by which new Federal Rules of Evidence 413 and 414 became a part of the Military Rules of Evidence in January of 1996.[143]

III. Judicial Treatment of Federal Rule of Evidence 404(b)

A. Michelson *Gives Way to* Huddleston

While some federal courts continued to apply an exclusionary approach to uncharged misconduct evidence even after Federal Rule of Evidence 404(b) became law,[144] the Supreme Court settled the issue in the 1988 case of *Huddleston v. United States*.[145] Huddleston was accused of knowingly possessing and selling stolen blank Memorex videotapes.[146] The only material issue at trial was whether or not he knew the tapes were stolen.[147] To prove this knowledge, the government offered uncharged misconduct evidence, under Rule 404(b), of two other acts. The first piece of evidence was that, two months prior to selling the videotapes, Huddleston had offered to sell a large quantity of television sets at a very low price. He admitted at trial that the television sets came from the same person that had provided the videotapes, and he was unable to produce a bill of sale.[148] The second piece of evidence was that, one month after selling the videotapes, he had offered to sell a large

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[140] *Id.* MIL. R. EVID. 1102.
[141] *See* SALTZBURG ET AL., *supra* note 129, at 933.
[142] MCM, *supra* note 131, MIL. R. EVID. 1102 analysis, app. 22.
[143] *See infra* text accompanying notes 380-81.
[144] *See supra* text accompanying notes 124-27.
[145] 485 U.S. 681 (1988).
[146] *Id.* at 682.
[147] *Id.* at 683.
[148] *Id.* at 683-84, 691.

quantity of Amana appliances to an undercover FBI agent for well below their market value. The person Huddleston later identified as the source of the televisions, videotapes, and appliances, also was the person who was driving the truck with the Amana appliances when the two of them were arrested for that transaction.[149]

One panel of the United States Court of Appeals for the Sixth Circuit initially reversed Huddleston's conviction for possessing the videotapes because the government had not proven the uncharged misconduct by clear and convincing evidence.[150] On rehearing, a different panel affirmed the conviction, holding that the appropriate standard of proof for the other acts was a preponderance of the evidence standard.[151] Huddleston appealed, claiming that the trial court had failed to make a preliminary finding of fact that the acts had occurred prior to admitting the 404(b) evidence.[152] The Supreme Court granted certiorari to decide whether or not such a preliminary finding of fact was required.[153]

Introducing his opinion with the text of Rule 404(b),[154] Chief Justice Rehnquist authored a clear explanation of how the rule is supposed to work. The rule, he said, "generally prohibits . . . evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case."[155] So the "threshold inquiry" is whether or not the uncharged misconduct "is probative of a material issue other than character."[156] In analyzing whether the judge must make a preliminary finding of fact that the acts occurred, the Chief Justice explained that Article IV of the Federal Rules of Evidence breaks down into three parts.

> Rules 401 and 402 establish the broad principle that relevant evidence . . . is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of unfair prejudice." Rules 404 through 412 address specific types of evi-

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[149] *Id.* at 683-84.
[150] *Id.* at 684.
[151] *Id.*
[152] *Id.* at 686-87.
[153] *Id.* at 685.
[154] *Id.* at 682.
[155] *Id.* at 685.
[156] *Id.* at 686.

> dence that have generated problems. Generally these latter rules do not flatly prohibit the introduction of such evidence but instead limit the purpose for which it may be introduced. Rule 404(b), for example, protects against the introduction of extrinsic act evidence when that evidence is offered solely *to* prove *character*.[157]

The Chief Justice went on to say that Rule 404(b) did not explicitly or implicitly require a preliminary finding of fact, and that evidence offered for a proper noncharacter purpose is limited only by Rules 402 and 403.[158] Further emphasizing the inclusionary intent of Rule 404(b), the opinion cited examples from its legislative history to show that Congress intended that uncharged misconduct evidence be liberally admitted.[159] Right or wrong, "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence."[160] Apparently, the concerns of Congress were much the same when they debated and enacted the new Federal Rules of Evidence 413 and 414.[161]

In the final paragraph of the opinion, Chief Justice Rehnquist gave a final bow to *Michelson*,[162] the last time that a majority Supreme Court opinion cited it,[163] stating the Court's concern that Rule 404(b) might admit unduly prejudicial evidence.[164] The Court then listed four protections against this danger: the proper purpose requirement of Rule 404(b); the relevancy requirement of Rule 402; the balancing requirement of Rule 403; and the ability to request limiting instructions under Rule 105.[165] While some Courts of Appeals continue to cite Michelson for its broad prohibition on propensity evidence, they generally recognize that Rule 404(b) and Huddleston mark a new direction in the law of uncharged misconduct evidence.[166] The Huddleston opinion extinguished any credible

[157] *Id.* at 687 (emphasis added).

[158] *Id.* at 687-88.

[159] *Id.* at 688.

[160] *Id.* at 688-89.

[161] *See infra* text accompanying notes 354-79.

[162] Michelson v. United States, 335 U.S. 469 (1948). *See supra* text accompanying notes 79-90.

[163] SHEPARD'S UNITED STATES CITATIONS (1994 & Supp. 1996) *available in* LEXIS, Shepard's Service (search conducted on Feb. 16, 1996).

[164] *Huddleston*, 485 U.S. at 691.

[165] *Id.* at 691-92.

[166] *See, e.g.*, United States v. Powers, 59 F.3d 1460, 1474 n.1 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 784 (1996); United States v. Brawner, 32 F.3d 602, 604 (D.C. Cir. 1994); United States v. Jemal, 26 F.3d 1267, 1272 (3d Cir. 1994); United States v. Betts, 16 F.3d 748, 759 (7th Cir. 1994); United States v. Robertson, 15 F.3d 862, 877-78 (9th Cir. 1994) (Reinhardt, Cir. J., concurring) (criticizing the widening range of admissible evidence brought about by *Huddleston* and other cases), *rev'd on other grounds*, 115 S. Ct. 1732 (1995).

argument that Rule 404(b) embodied an exclusionary approach to this type of evidence. Another subtle, but important, distinction between the two cases is that *Huddleston*, like Rule 404(b), spoke of prohibiting the use of uncharged misconduct to prove "character," not "propensity," as it had previously been called. By distinguishing between the two, the proper purposes for using uncharged misconduct evidence can be more logically explained.[167]

B. Rule 404(b) Constitutional Issues

1. Double Jeopardy — In the **1990** case of *Dowling u. United States*,[168] the Supreme Court first addressed the question of whether any double jeopardy implications would attach to the use of Rule 404(b) evidence of prior acts for which the accused had already been tried. Dowling was charged with robbing a bank in the Virgin Islands wearing a ski mask and carrying a small pistol.[169] Although an eyewitness at the scene of the robbery identified Dowling, the government offered evidence of another alleged robbery two weeks later in which the victim saw a similar ski mask and small pistol and identified Dowling as the robber sporting them.[170] The government argued that the evidence was admissible under Rule 404(b) to prove identity, not only because of the similar mask and gun used, but also because Dowling was working with the same accomplice on both occasions.[171] The problem was that Dowling had already been tried and acquitted of the second robbery.[172] The defense argued that the government should be prevented from using the evidence, citing the Supreme Court's incorporation of collateral estoppel principles into the Double Jeopardy Clause in the case of *Ashe v. Swenson*.[173]

Justice White's majority opinion distinguished *Ashe v. Swenson* as a case in which the acquittal had reflected that the jury had determined an ultimate issue adversely to the government.[174] On the contrary, the Court saw many reasons why the jury might have acquitted Dowling of the second robbery without necessarily disbelieving the identification testimony.[175] But more importantly, the Court pointed out that an acquittal of a crime is not the same as a

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[167] *See infra* **text** accompanying notes 387-98.
[168] 493 U.S. 342 (1990).
[169] *Id.* at 344.
[170] *Id.* at 344-45.
[171] *Id.* at 345.
[172] *Id.*
[173] *Id.* at 347-48 (citing Ashe v. Swenson, 397 U.S. 436 (1970)).
[174] *Id.*
[175] *Id.* at 351-52.

finding of innocence.[176] It merely means that the jury did not conclude that the defendant was guilty beyond a reasonable doubt. *Huddleston*[177] established that Rule 404(b) only requires the government to offer evidence from which the jury can reasonably conclude that the prior act occurred[178]—a preponderance of the evidence standard.[179] That a prior jury might have found reasonable doubt did not collaterally estop the use of the evidence in a later proceeding with a lower standard of proof.[180]

Dowling was a case in which the acts previously tried were completely unrelated to the charged acts. Later in the same 1990 term, the case of Grady *v. Corbin*[181] clouded the relationship between Rule 404(b) and the Double Jeopardy Clause in cases where the same conduct is the basis of both trials. Corbin had been drinking and driving and crashed his car into two oncoming vehicles, killing one person and seriously injuring another.[182] Corbin received misdemeanor traffic tickets for driving while intoxicated and failing to keep to the right of the median.[183] The District Attorney's office began preparing for a homicide prosecution three days later.[184] Unfortunately for the government, the Assistant District Attorneys that handled the routine traffic tickets never spoke to those handling the homicide prosecution and did not know about the injuries.[185] Corbin pleaded guilty on the misdemeanors and received a sentence including a fine and a six-month license revocation.[186] When the government went forward on the homicide and assault charges, Corbin moved to dismiss on double jeopardy grounds.[187] The New York Court of Appeals reversed the trial court's denial of the motion and the state petitioned the Supreme Court for a writ of certiorari.[188]

Holding that the second prosecution was barred, Justice Brennan's majority opinion apparently expanded the protection of

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[176] *Id.* at 348-49.

[177] Huddleston v. United States, 485 U.S. 681 (1988). See *supra* text accompanying notes 145-67.

[178] *Dowling*, 493 U.S. at 348 (citing Huddleston v. United States, 485 U.S. 681, 689 (1988)).

[179] *Huddleston*, 485 U.S. at 690.

[180] *Dowling*, 493 U.S. at 348-49.

[181] 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

[182] *Id.* at 511.

[183] *Id.*

[184] *Id.*

[185] *Id.* at 511-13.

[186] *Id.* at 512-13.

[187] *Id.* at 514.

[188] *Id.* at 508.

the Double Jeopardy Clause. The clause says "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[189] The "same offence" language had previously been interpreted as invoking the "same elements" test of Blockburger *v.* United *States*,[190] with limited exceptions.[191] Justice Brennan's opinion stated the new rule that double jeopardy would attach if "to establish an essential element of an offense charged in [a later] prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted."[192]

As appealing as this language may seem in the context of an accused being tried twice for the same conduct, Justice O'Connor's dissent aptly pointed out that this rule could vitiate Rule 404(b) in cases where the uncharged misconduct had been previously prosecuted.[193] The majority claimed not to have adopted a "same evidence" test that would prevent the government from using any evidence that had been introduced in a previous prosecution.[194] Instead, they merely extended double jeopardy protection to cases in which the government had to or chose to prove the previously prosecuted conduct as an element of the offense prosecuted in the later case.[195] Nevertheless, the broad holding of the Court could easily be misread to exclude otherwise admissible uncharged misconduct evidence in later cases where double jeopardy would not apply.

Fortunately for those confused by this apparent conflict, the Court clarified the issue in United States *v.* *Felix*.[196] Felix was engaged in an ongoing enterprise manufacturing drugs.[197] The Drug Enforcement Agency had raided an Oklahoma drug lab he had been operating, so he moved to Missouri and attempted to acquire precursor chemicals and equipment to set up a lab there.[198] Drug Enforcement Agency agents found out about this and arrested him

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[189]U.S. CONST. amend. V (emphasis added).

[190]*Grady*, 495 U.S. at 510 (citing Blockburger v. United States, **284 U.S.** 299 (1932)).

[191]Justice Scalia, in dissent, described two limited situations allowing departure from the ***Blockburger*** test: (1) where one statutory offense incorporates another statutory offense by reference, but does not list the elements of the incorporated offense; and (2) where collateral estoppel applies, as discussed ***supra*** at text accompanying notes 173-75. *Id.* at 528 (Scalia, J., dissenting).

[192]*Id.* at 510. Very similar language **also** appears later in the opinion. ***Id.*** at 521.

[193]*Id.* at ***526*** (O'Connor, J., dissenting).

[194]*Id.* at 521-22 & n.12.

[195]*Id.* at 521-23.

[196]503 ***U.S. 378*** (1992). ***See also*** United States v. Dixon, 509 U.S. 688 (1993) (explicitly overruling ***Grady).***

[197]*Felix*, 503 U.S. at 380.

[198]*Id.*

in Missouri.[199] In a federal trial for the attempted manufacture in Missouri, prosecutors introduced evidence of his activities in Oklahoma, under Rule 404(b), to prove criminal intent.[200] After this conviction, federal prosecutors in Oklahoma later charged Felix with seven counts of drug offenses committed in Oklahoma.[201] Of the seven charges, evidence of five of them had been admitted at the Missouri trial under Rule 404(b).[202] Relying on *Grady v. Corbin*,[203] the court of appeals reversed the convictions on the five charges that duplicated the evidence used in the Missouri trial.[204] Because direct evidence to prove these charges had been introduced at the Missouri trial, the Court of Appeals concluded that the Oklahoma trial "subjected Felix to a successive trial for the same conduct."[205]

Chief Justice Rehnquist, writing for a unanimous Court,[206] clarified the relationship between Rule 404(b) and the Double Jeopardy Clause. Pointing out that the five charges in question were for Oklahoma conduct that had not been charged in the Missouri trial, the Chief Justice explained that the mere fact that evidence of the acts had been introduced under Rule 404(b) did not constitute a prosecution for that conduct.[207] The opinion went on to highlight the passage from *Grady v. Corbin*[208] where the Court had disclaimed the adoption of a "same evidence" test, and to state that "a mere overlap in proof. . . does not establish a double jeopardy violation."[209] Finally, the Court noted that it never would have reached the collateral estoppel issue in *Dowling*[210] if merely admitting evidence under Rule 404(b) had constituted a second prosecution for the prior-

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[199] *Id.*

[200] *Id.* at 381.

[201] *Id.* at 382. Felix also was charged with a count of conspiracy in which two of the nine alleged overt acts were the acts that he had been prosecuted for in Missouri. This raised a more difficult double jeopardy question in light of *Grady v. Corbin*, but a question I will not deal with here because it was unrelated to Rule 404(b).

[202] *Id.* at 382-84.

[203] 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993). *See supra* text accompanying notes 181-95.

[204] *Felix*, 503 U.S. at 383. The court of appeals also reversed the conspiracy conviction. *See supra* note 201.

[205] *Felix*, 503 U.S. at 384 (quoting United States v. Felix, 926 F.2d 1522, 1530-31 (10th Cir. 1991)).

[206] *Id.* at 379. Justices Stevens and Blackmun did not join in the portion of the opinion on the conspiracy charge not dealt with here, but they did join with the other seven justices in the portion dealing with the Rule 404(b) issue.

[207] *Id.* at 385-86.

[208] 495 U.S. 508 (1990), *overruled* by United States v. Dixon, 509 U.S. 688 (1993). *See supra* text accompanying notes 181-95.

[209] *Felix*, 503 U.S. at 386.

[210] Dowling v. United States, 493 U.S. 342 (1990). *See supra* text accompanying notes 168-80.

acquitted offense.[211] Felix established that presenting evidence of other acts under Rule 404(b), either before or after prosecution for the acts, generally does not carry any double jeopardy consequences.

2. Due Process — Another constitutional question is whether presenting evidence of an accused's uncharged acts somehow violates "fundamental fairness" as embodied in the Due Process Clause. The Court briefly dealt with this issue in Dowling *u.* United *States.*[212] Recognizing that the introduction of Dowling's prior-acquitted acts carried "the potential to prejudice the jury," the Court reasoned that the protections within the Federal Rules of Evidence, especially the use of limiting instructions, were ample to prevent abuse.[213] Justice White's opinion demonstrated a reluctance to find a Due Process violation in a long-standing rule of evidence:

> Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate "fundamental fairness" very narrowly. . . . Especially in light of the limiting instructions provided by the trial judge, we cannot hold that the introduction of [the prior-acquitted acts] testimony merits this kind of condemnation.[214]

Of all the cases in which the government might use uncharged misconduct evidence against an accused, this case would have been one of the most likely to draw due process objections, because of the prior acquittal on the charges arising from the acts. But the Court refused to use the Due Process Clause to protect against this use, finding that the Double Jeopardy Clause215 amply protects the accused against multiple trials for the same offense.[216] At least where Rule 404(b) evidence is offered for a proper noncharacter purpose, its use does not violate due process.

But what about using uncharged misconduct evidence to prove character **or** propensity, as is possible under new Federal Rules of Evidence 413 and 414? This issue has yet to be resolved. In the 1991 case of Estelle *u. McGuire,*[217] the Court specifically declined to

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[211] *Felix,* **503** U.S. at **386-87.**

[212] 493 U.S. **342 (1990). See *supra*** text accompanying notes 168-80.

[213] *Id.* at **352-53.**

[214] *Id.*

[215] ***See supra*** text accompanying notes 168-211.

[216] *Dowling,* **493** U.S. at **354.**

[217] 502 U.S. **62** (1991).

decide just this question. McGuire was convicted in California state court for murdering his infant daughter.[218] At trial, the government introduced evidence that the autopsy had revealed prior injuries in various stages of healing, showing a long-term pattern of abuse.[219] Instructing the jury on how to use this evidence, the trial court said that it:

> was received and may be considered by you only for the limited purpose of determining if it tends to show . . . a clear connection between the other two offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.[220]

After exhausting state appeals, the defense sought habeas corpus relief in the federal courts, arguing, among other things, that this was a propensity instruction and therefore violated the "fundamental fairness" standard of the Due Process Clause.[221] According to the defense, this instruction essentially told the jury that it could convict based solely on the fact that the defendant had committed other offenses in the past and hence had a propensity to commit this type of crime.[222]

Chief Justice Rehnquist, writing for the majority, rejected this interpretation of the instruction. He placed emphasis on the "clear connection" language to show that the jury more likely would have interpreted the instruction to mean it could only consider the prior acts if they were connected to the charged act in some way.[223] This, he said, was akin to the use of prior acts evidence under Federal Rule of Evidence 404(b) to show intent, identity, motive, or plan.[224] The Chief Justice also pointed out that the trial judge gave a limiting instruction that the jury could not use the prior acts evidence to infer the defendant's bad character or disposition to commit crimes.[225]

Having found that the instruction in question was not a propensity instruction, the Court did not reach the constitutionality

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[218] *Id.* at 64.

[219] *Id.* at 65.

[220] *Id.* at 71 (quoting App. 41), 67 n.1 (quoting the more complete version of the instruction).

[221] *Id.* at 64, 71.

[222] *Id.* at 74.

[223] *Id.* at 75.

[224] *Id.*

[225] *Id.*

of using propensity evidence. But the opinion specifically left the issue open, stating in a footnote: "Because we need not reach the issue, we express no opinion on whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime."[226] This issue may soon be raised in the context of a challenge to Federal Rule of Evidence 413 or 414.

IV. Judicial Treatment of Military Rule of Evidence 404(b)

A. Pre-Military Rules of Evidence Practice.

Before the Military Rules of Evidence became effective in 1980, military courts practiced under the rules of evidence promulgated in the 1969 Manual *for Courts-Martial*.[227] Paragraph 138g of those rules contained an uncharged misconduct provision similar in many ways to the new Rule 404(b).[228] Consequently, when the new rules came into effect, many courts and practitioners simply applied the same case law precedents already decided under the old rule. Probably the best illustration of the way the old rule was applied is the case of United States v. *Janis*.[229]

Sergeant Janis was accused of murdering his infant son by squeezing his head violently. To prove criminal intent, the government introduced evidence of the death, three years before and under similar circumstances, of another infant son of Janis.[230] In upholding the trial judge's decision to admit the uncharged misconduct evidence, the Court of Military Appeals[231] reviewed the rules in this area.

First, the court restated the general rule that uncharged misconduct evidence was inadmissible because the ordinary use of such evidence would be to show criminal disposition.[232] But, the Court of Military Appeals noted, there were "seven exceptions to

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[226] *Id.* at 75 n.5.

[227] 1969 MANUAL, supra note 128. *See* supra text accompanying notes 128-36.

[228] 1969 MANUAL, supm note 128, ¶ 138g. *See* supm text accompanying notes 128-36.

[229] 1 M.J. 395 (C.M.A. 1976).

[230] *Id.* at 396.

[231] Although the United States Court of Military Appeals is now called the United States Court of Appeals for the Armed Forces, at the time most of the cases discussed in this article were decided, the old name was still in place. *See* supra note 8.

[232] *Janis*, 1 M.J. at 396.

the general rule,"[233] one of which was to show "knowledge or guilty intent."[234] Satisfied that the circumstances surrounding the death of the other son were relevant to the intent issue, the court then listed three other prerequisites to admission for evidence falling within an exception.[235] These were: (1) "a nexus in time, place, and circumstance between the offense charged and the uncharged misconduct;'' (2) "plain, clear, and conclusive" evidence of the uncharged misconduct; and (3) a determination that the evidence's potential prejudicial impact did not "far outweigh" its probative value.[236]

The Court of Military Appeals described the nexus required as being a "reasonably close connection in point of time as well as a 'definite relationship to one of the elements of the offense charged,'"[237] which in this case was satisfied by the substantial similarity between the two deaths.[238] The three-year time interval did not strike the court as being too remote.[239] The court drew the standard of proof required from other federal cases,[240] all of this predating the ***Huddleston*** decision.[241] The similarity of the final balancing requirement to a Federal Rule of Evidence 403 balancing was no coincidence; the Court of Military Appeals cited the Federal Rule in its opinion, even though the military version of that rule was still four years away.[242]

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[233] This formulation sounds like an exclusionary approach to the rule with a "closed" list of exceptions, contrary to the apparent language of the rule itself. ***See supra*** text accompanying notes 130-33. But as early as 1954, the Court of Military Appeals had addressed the debate between inclusionary and exclusionary approaches and determined that the military rule most likely embodied the former. ***See*** United States v. Haimson, 17 C.M.R. 208, 226-27 n.4 (C.M.A. 1954). The Court of Military Appeals has reaffirmed this analysis on more than one occasion. ***See, e.g.,*** United States v. Stokes, 12 M.J. 229, 238-39 (C.M.A. 1982) (pre-Military Rules of Evidence); United States v. Thomas, 11 M.J. 388, 393 (C.M.A. 1981) (pre-Military Rules of Evidence).

[234] *Janis*, 1 M.J. at 396-97.

[235] *Id.* at 397.

[236] *Id.*

[237] *Id.* (quoting United States v. Kelley, 23 C.M.R. 48, 53 (C.M.A. 1957)).

[238] *Id.*

[239] *Id.*

[240] *Id.* (citing Kraft v. United States, 238 F.2d 794, 802 (8th Cir. 1956)). ***See also*** United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977) (describing a list of prerequisites very similar to the scheme laid out in ***Janis), cert.*** *denied,* 439 U.S. 847 (1978).

[241] ***See supra*** text accompanying notes 145-67.

[242] *Janis*, 1 M.J. at 397. ***See supra*** text accompanying notes 134-36.

B. Applying the Military Rules of Evidence

The three-part *Janis* test was the state of the law when the new Military Rules of Evidence came along in 1980. Most of the initial appellate cases addressing Rule 404(b) simply applied the *Janis* test as if the law had not changed, often citing the Drafter's Analysis accompanying the new rule for the proposition that Rule 404(b) had made no substantial change in the law.[243] Not until 1984 did the Court of Military Appeals begin to make a slow break from *Janis* in the case of *United States v. Brannan*.[244]

Brannan was convicted of drug offenses despite his denials and his claim that he had been framed.[245] The government had introduced evidence of prior similar drug offenses, ostensibly to show a common scheme or plan or to show a modus operandi.[246] In evaluating the admissibility of this evidence, Judge Fletcher, writing for the Court of Military Appeals, acknowledged that *Janis* had involved a similar issue.[247] But he went on to hint that *Janis* might no longer be appropriate precedent, stating that "[tloday, our review of this question is more particularly guided by Mil. R. Evid. 404(b) and 403."[248] Without explicitly rejecting the *Janis* analysis, Judge Fletcher adopted a different three-step process. First, "identify the evidence . . . that tended to show that appellant had engaged in other offenses."[249] Second, "identify the particular purposes" for offering the evidence under Rule 404(b).[250] And third, apply a Rule 403 balancing to ensure that the danger of "undue" prejudice did not substantially outweigh the probative value of the evidence.[251] The Court of Military Appeals ultimately rejected the government's claimed purposes for offering the evidence, but found the evidence was admissible to rebut Brannan's denial of criminal intent.[252]

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[243] *See, e.g.*, United States v. Vilches, 17 M.J. 851 (N.M.C.M.R. 1984); United States v. Williams, 17 M.J. 548 (A.C.M.R. 1983); United States v. Lambert, 17 M.J. 600 (N.M.C.M.R. 1983); United States v. Hancock, 14 M.J. 998 (A.C.M.R. 1982); United States v. DiCupe, 14 M.J. 915 (A.F.C.M.R. 1982), *aff'd*, 21 M.J. 440 (C.M.A.), cert. denied, 479 U.S. 826 (1986).

[244] 18 M.J. 181 (C.M.A. 1984). This appears to have been the first opportunity that the Court of Military Appeals had to address the issue in a case tried under the new rule, due to the time lag in the appellate process.

[245] *Id.* at 181-82.

[246] *Id.* at 183.

[247] *Id.* at 182.

[248] *Id.*

[249] *Id.* at 183.

[250] *Id.* at 185.

[251] *Id.* at 184-85.

[252] 21 M.J. 440 (C.M.A.), cert. denied, 479 U.S. 826 (1986).

While *Brannan* appeared to make a break from *Janis*, the break was not a clean one. In the 1986 case of *United States* u. *DiCupe*,[253] the Court of Military Appeals quoted verbatim the lower court's restatement of the *Janis* test without comment, implying that the test was still valid.[254] But later the same year, in *United States v. Brooks*,[255] the Court of Military Appeals took another step toward discarding *Janis*,

Brooks, like Brannan, had been convicted of drug offenses, including a distribution charge.[256] A defense witness testified that he had sold the drugs alone and that Brooks was an innocent bystander.[257] The government unsuccessfully attempted to elicit from this witness that Brooks had participated in prior drug transactions with him, to rebut this claimed lack of intent.[258] In a two-judge opinion, Judge Cox analyzed the propriety of the trial counsel's questions in terms of whether or not the evidence would have been admissible if it had been elicited.[259] He explained that prior to Rule 404(b), the *Janis* test had "strictly limited" the use of uncharged misconduct evidence.[260] But citing *Brannan*, he stated that "[slince September 1, 1980, the admission of such evidence has been governed by [Rule] 404(b)."[261] He went on to compare the similarities between the new and old rules in their "proper purpose" requirement and in the need to weigh the danger of unfair prejudice against probative value.[262] But he implied — though he never specifically stated — that instead of a strict "nexus" requirement, the new rule imposed only a "relevance to a proper purpose" requirement.[263]

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[253] *Id.* at 443-44 (quoting United States v. DiCupe, 14 M.J. 915, 917 (A.F.C.M.R. 1982)).

[254] 22 M.J. 441 (C.M.A. 1986).

[255] *Id.* at 442.

[256] *Id.* at 443.

[257] *Id.* The trial counsel argued the usual 'common plan or scheme" and "signature'' purposes for eliciting the prior act evidence, apparently feeling constrained to pigeon hole the evidence into an established category.

[258] *Id.* at 443-44.

[259] *Id.* at 444.

[260] Id. The opinion restated the three prerequisites of the *Janis* test. Although not critical to the case, the third element was stated differently than in *Janis*. Here the Court of Military Appeals stated that the government must show "that the probative value of the evidence far outweighed the potential prejudicial impact." Id. In *Janis*, the Court of Military Appeals stated the issue was "whether the integrity and fairness of the trial process dictates that the evidence be excluded because *its potential prejudicial impact far outweighs its probative value."* United States v. Janis, 1 M.J. 395, 397 (C.M.A. 1976) (emphasis added). Accordingly, the actual *Janis* test is not as strict as the restatement in *Brooks* makes it appear.

[261] *Brooks*, 22 M.J. at 444 (citing United States v. Brannan, 18 M.J. 181 (C.M.A. 1984)).

[262] *Id.*

[263] *Id.*

The Court of Military Appeals held that the evidence in this case met the tests imposed by Rules 404(b) and 403.[264]

C. Refining the Standard of Proof

Although Brooks strongly implied that the use of uncharged misconduct evidence was not as "strictly limited" under Rule 404(b) as it had been under *Janis*,[265] the Court of Military Appeals did not address the standard of proof required to admit the evidence. Janis had explicitly held that the uncharged acts must be proven by "plain, clear, and conclusive" evidence.[266] In United States *v. White*,[267] decided a month after Brooks, the Court of Military Appeals provided mixed signals on this question.

White, like Janis, was convicted for killing his young son by violent handling.[268] The government introduced evidence of the child's prior injuries, some older and some newer, to prove "battered child syndrome."[269] Through expert testimony, the government established that this tended to show the injuries were not accidental.[270] The defense had argued the evidence was irrelevant, because the government had failed to prove the accused inflicted the prior injuries.[271]

In assessing the admissibility of the prior injury evidence under Rule 404(b), Judge Cox adopted a "three-step analysis" very similar to the one Judge Fletcher had applied in *Brannan*.[272] The first question he said that the judge must ask as is, "[D]oes the evidence tend to prove that the accused committed prior crimes,

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[264] *Id.*

[265] *See supra* text accompanying notes 256-64.

[266] *See supra* text accompanying notes 235-36.

[267] 23 M.J. 84 (C.M.A. 1986).

[268] *Id.* at 85.

[269] *Id.* at 86. The expert witness defined "battered child syndrome" as "a clinical condition in young children, usually below the age of three, who receive nonaccidental multiple and sometimes generalized injuries to the body." *Id.* The Court of Military Appeals offered another definition:

> The diagnosis . . . is dependent on inferences, not a matter of common knowledge, but within the area of expertise of physicians whose familiarity with numerous instances of injuries accidentally caused qualifies them to express with reasonable probability that a particular injury or group of injuries to a child ***is not accidental or is not consistent with the explanation offered therefor but is instead the result of physical abuse by a person of mature strength.***

Id. at 87 (quoting State v. Tanner, 675 P.2d 539, 542 (Utah 1983) (quoting State v. Mulder, 629 P.2d 462,463 (Wash. Ct. App. 1981)).

[270] *Id.* at 86. ***See supra*** note 269.

[271] *White*, 23 M.J. at 86.

[272] *Id.* at 86-87. ***See supra*** text accompanying notes 244-52.

wrongs, or acts?"[273] The words "tend to prove" do not suggest an especially high standard of proof. On the contrary, they imply a preponderance standard. But in applying this test to the instant case, the Court of Military Appeals stated that the evidence "clearly established that prior . . . acts were committed by someone," and later, "that the circumstantial evidence clearly supports a finding that appellant, not someone else, battered the child on previous occasions."[274] While not holding that uncharged misconduct had to be proven "clearly," the Court of Military Appeals did not "clearly" reject the higher standard of proof either, thus leaving this issue unresolved for another two years.

In United States *v. Mirandes-Gonzalez*,[275] the standard of proof issue stood squarely before the court. This was another child abuse case, in which the government introduced evidence of a prior injury to rebut the defense of accident.[276] The defense argued the evidence was inadmissible because the government failed to prove "by clear and convincing evidence" that the accused had inflicted the prior injury.[277] Judge Cox, again writing for the court, took this opportunity to resolve any ambiguity that White had allowed to remain.[278] Citing the recent Supreme Court decision of Huddleston *v.* United *States*,[279] the Court of Military Appeals rejected, once and for all, any elevated standard of proof for uncharged misconduct evidence offered under Rule 404(b). According to the Court of Military Appeals, the question was "whether there is sufficient evidence for a reasonable court member to believe that the accused in fact committed the extrinsic offense."[280] Applying this test to the instant case, the court held that "the circumstantial evidence supports an inference that appellant injured the child on that occasion."[281] This time the word "clearly" was conspicuous by its absence.

In a brief concurring opinion, Judge Sullivan pointed out that the Supreme Court in Huddleston had "expressly recognized . . . 'that the strength of the evidence establishing the similar act is one of the factors the court may consider when conducting the Rule 403 balancing.'"[282] The Court of Military Appeals again highlighted this

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[273] *White*, 23 M.J. at 86-87.4

[274] *Id.* at 87.

[275] 26 M.J. 411 (C.M.A. 1988).

[276] *Id.* at 412.

[277] *Id.* at 413.

[278] *See supra* text accompanying notes 267-74.

[279] 485 U.S. 681 (1988). *See supm* text accompanying notes 145-67.

[280] *Mirandes-Gonzalez*, 26 M.J. at 414.

[281] *Id.*

[282] *Id.* (Sullivan, J., concurring) (quoting Huddleston v. United States, 485 U.S. 681, 689 n.6 (1988)).

shifting of emphasis from the Rule 404(b) test to the Rule 403 test in United States *v. Castillo*.[283] Speaking of the Rule 403 balancing test as the final step in the uncharged misconduct analysis, Chief Judge Everett wrote:

> The need for this evaluation is enhanced because now a very low threshold exists as to admissibility of evidence of other misconduct. No longer is it required that such evidence be "clear and convincing" as was once the case. [citing *Janis*[284]] Instead, now the military judge must admit the evidence if he concludes that the fact-finder could reasonably find by a preponderance of the evidence that the other misconduct had occurred, even though the judge himself would not make such a finding. [citing *Mirandes-Gonzalez*[285] and *Huddleston*[286]][287]

D. What Happened to Nexus?

In Brooks, Judge *Cox* implied that the Janis requirement of "nexus in time, place, and circumstance between the offense charged and the uncharged misconduct" had been superseded by a "relevance to a proper purpose" test in the Military Rules of Evidence.[288] In the 1989 case of United States *v. Ferguson*,[289] the Court of Military Appeals confirmed this analysis, but in applying a "relevance" test, illustrated that it might not be much different from a "nexus" test. Ferguson was convicted of child sexual abuse of one of his two step-daughters.[290] At trial, the victim testified briefly about uncharged prior similar acts and the other step-daughter testified about Ferguson's prior similar acts with her.[291] The government argued the uncharged misconduct was admissible under Rule 404(b) to prove modus operandi, plan, and specific intent.[292] The military judge allowed the testimony and, after vacillating on the proper purpose for the evidence, instructed the members it could only be considered on the issue of modus operandi.[293] But the key similarities

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[283] 29 M.J. 145 (C.M.A. 1989).
[284] *See supra* text accompanying notes 229-42.
[285] *See supra* text accompanying notes 275-82.
[286] *See supra* text accompanying notes 145-67.
[287] *Castillo*, 29 M.J. at 151.
[288] *See supra* text accompanying notes 255-64.
[289] 28 M.J. 104 (C.M.A. 1989).
[290] *Id.* at 105.
[291] *Id.* at 105-06.
[292] *Id.*
[293] *Id.* at 106-07.

that would have indicated a modus operandi were really between the uncharged acts with both step-daughters and were not alleged as part of the charged acts.[294]

Chief Judge Everett, writing for the court, approached this confused state of the evidence with a simple question: "What was the relevance of this evidence of uncharged misconduct?"[295] Citing Military Rules of Evidence 401 and **402,** as well as 404(b), the Chief Judge analyzed the interplay between them. He concluded that:

> [Rule] 404(b) clarifies that evidence of past wrongdoing is not "relevant" to show in a general sense that, "if he did it before, he probably did it again." . . . . [S]uch evidence of uncharged misconduct "may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This list is illustrative, not exhaustive; but the point it manifestly makes is that this kind of evidence, to be relevant, must directly relate to some specific "fact that is of consequence to the . . . action," not to the general issue of criminality.[296]

The military judge had only allowed the members to use the uncharged misconduct on the issue of modus operandi. Chief Judge Everett pointed out that modus operandi was relevant only to prove identity, which was not at issue in the case. Hence the evidence was not relevant.[297] Anticipating other potential arguments for admissibility, he went on to say that this evidence lacked "close parallels" with the charged acts,[298] hinting that some kind of "nexus" may be required to show relevance. Perhaps the best conclusion to draw from Ferguson is that a strict "nexus in time, place, and circumstances" is not required, but because relevance requires a logical link, some kind of "nexus in time, place ***or*** circumstances" is required.

Confirming that Ferguson had correctly placed the emphasis on relevance, the Court of Military Appeals crystallized the three-step test for uncharged misconduct evidence in United States *v. Reynolds*.[299] The first step was the standard of proof: evidence reasonably supporting a finding (by a preponderance of the evidence)

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[294] *Id.* at 107-08.

[295] *Id.* at 108.

[296] *Id.* (emphasis added).

[297] *Id.* at 109.

[298] *Id.* at 108-09 (quoting United States v. Cuellar, 27 M.J. 50, 53 (C.M.A. 1988), cert. *denied,* 493 U.S. 811 (1989)).

[299] 29 M.J. 105, 109 (C.M.A. 1989).

that the accused did the acts.[300] The second step was the relevance issue: a fact at issue (other than general criminality) had to be made more or less probable.[301] And the third step was the Rule 403 balancing: the danger of unfair prejudice could not substantially outweigh the probative value of the evidence.[302] This test has become the standard for analyzing uncharged misconduct evidence under the Military Rules of Evidence.[303] Even though the "nexus" requirement is conspicuously absent, the Court of Military Appeals has continued to speak of "nexus" in later cases, often in terms of whether or not prior acts are linked to the charged acts in such a way as to be relevant.[304] But in its latest discussion of the Janis "nexus" requirement, the Court of Military Appeals incorporated the analysis into the Rule 403 balancing component of the test, not into the relevance component.[305]

E. The Teeth Shift from Rule *404(b)* to Rule *403*

Judge Sullivan's concurring opinion in Mirandes-Gonzalez and Chief Judge Everett's opinion in Castillo noted a shifting of the power to exclude evidence from Rule 404(b) to Rule 403 in the context of the lowered standard of proof for uncharged misconduct evidence.[306] Judge Crawford's opinion in United States *v. Metz*[307] recognized that the Janis 'nexus" requirement had migrated from a Rule 404(b) evidence prerequisite to a Rule 403 "key factor."[308] This trend shows that Rule 404(b) has become a very narrow rule that excludes very little evidence. If the evidence is irrelevant, Rule 402 excludes it. If the evidence is relevant, but only to prove the character of the

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[300] *Id.* (citing United States v. Mirandes-Gonzalez, 26 M.J. 411 (C.M.A. 1988)). ***See supra*** text accompanying notes 275-82. The military judge need not make a preliminary finding that the evidence meets this standard. ***See supra*** text accompanying notes 145-67.

[301] *Reynolds,* 29 M.J. at 109 (citing United States v. Ferguson, 28 M.J. 104, 108 (C.M.A. 1989)). ***See supra*** text accompanying notes 289-98.

[302] *Reynolds*, 29 M.J. at 109 (citing MANUAL FOR COURTS-MARTIAL, **UNITED** STATES, MIL. R. Evm. 403 (1984); STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF **EVIDENCE** MANUAL 362 (2d ed. 1986 & Supp. 1988)).

[303] *See, e.g.*, United States v. Dorsey, 38 M.J. 244, 246 (C.M.A. 1993); United States v. Rushatz, 31 M.J. 450,457 (C.M.A. 1990).

[304] *See, e.g.*, ***Rushatz,*** 31 M.J. at 457 ("sufficient nexus . . . to make the . . . testimony relevant").

[305] United States v. Metz, 34 M.J. 349, 352 (C.M.A. 1992) ("A key factor [in the Rule 403 balancing] is whether the 'nexus' between the uncharged misconduct and the crime is close 'in time, place, and circumstance."' [citing *Janis*]).

[306] ***See supra*** text accompanying notes 282-87.

[307] 34 M.J. 349, 352 (C.M.A. 1992). ***See supra*** note 305.

[308] *Metz,* 34 M.J. at 352.

accused, then Rule 404(b) excludes it. All other relevant evidence that clears this hurdle flows through to Rule **403,** where the final possibility of exclusion resides.

The recent case of United ***States*** *v. Walker*[309] best illustrates the culmination of this trend. A members court-martial convicted Walker of a single specification of cocaine use.[310] The government had introduced medical records showing that he had received treatment for sinusitis[311] on six occasions prior to and after the alleged cocaine use.[312] An expert testified that sinus problems would be one possible symptom of chronic cocaine use, but admitted on cross-examination that many other things could cause such problems.[313] The government argued that the evidence of prior regular cocaine use was relevant to prove knowing use on the charged occasion, an element of the offense, and to rebut the accused's defense of innocent ingestion.[314] The military judge admitted this evidence without giving any limiting or cautionary instructions to the members on its use.[315]

Applying the Rule 404(b) admissibility standard, Chief Judge Sullivan, writing for a unanimous court, concluded that the evidence met that low standard.[316] The accused had raised innocent ingestion as a defense, so knowledge and absence of mistake or accident were in issue.[317] The Chief Judge pointed out that "evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence . . . more probable or less probable. . . .'"[318] That the expert testified that sinusitis can be a symptom of regular drug use made the sinusitis evidence relevant to prove the uncharged misconduct (prior drug use), which was relevant to prove knowing use on the charged occasion.[319] That the expert had not examined the accused or his medical records only affected the weight to be afforded to the evidence.[320]

The court's analysis of the Rule 403 question arrived at a dif-

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[309] 42 M.J. 67 (1995).

[310] *Id.* at 68.

[311] The expert defined sinusitis as "inflammation . . . of the sinuses." *Id.* at 69.

[312] *Id.* at 68, 70.

[313] *Id.* at 69-70.

[314] *Id.* at 70-71.

[315] *Id.* at 71, 74.

[316] *Id.* at 71-73.

[317] *Id.* at 71-72.

[318] *Id.* at 73 (quoting MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 401 (1984)).

[319] *Id.* at 72-73.

[320] *Id.* at 73.

ferent result, however.[321] Analyzing factors that the Junis test would have considered under the Rule 404(b) analysis,[322] the Chief Judge concluded that the trial judge had abused his discretion under Rule 403.[323] That so many different causes other than drug use could explain the sinusitis, under Junis would have indicated a failure to prove the uncharged misconduct by "plain, clear, and conclusive evidence."[324] Here it indicated the low probative value of the otherwise admissible evidence as it was tossed into the Rule 403 hopper.[325] Likewise, for the fact that the expert had not examined the accused personally.[326] Because some of the sinusitis evidence was remote in time from the charged offense,[327] this might have triggered a "nexus" violation under *Janis*,[328] but here it was just another unenumerated factor in the probative value analysis.[329] So while this evidence was relevant and admissible under Rule 404(b), the danger of unfair prejudice substantially outweighed its low probative value, especially in the absence of limiting instructions,[330] making it inadmissible under Rule 403.

The trend toward Rule 403 enforcement is important because it gives trial and appellate judges much greater flexibility in admitting or excluding evidence. Abandoning the previously restrictive standards for admitting uncharged misconduct evidence in favor of a mere "relevance to a proper purpose" standard allows judges to admit almost any probative evidence of guilt, subject only to Rule

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[321] *Id.* at 73-74.

[322] *See supra* text accompanying notes 229-42.

[323] *Walker*, 42 M.J. at 74.

[324] *See supra* text accompanying notes 235-36.

[325] *Walker*, 42 M.J. at 73.

[326] *Id.* at 74

[327] *Id.* at 70.

[328] *See supra* text accompanying notes 235-39. Under these circumstances a "nexus" violation would admittedly be unlikely because the uncharged misconduct evidence bracketed the time of the charged offense. *Walker*, 42 M.J. at 70. Furthermore, if the idea is to prove knowledge of cocaine's physical attributes and the symptoms of cocaine use to rebut accidental or unknowing ingestion, the time that the knowledge was acquired would not be of great importance as long as it was before the charged knowing use.

[329] A better example of temporal remoteness being addressed as a Rule 403 factor instead of a Rule 404(b) factor is United States v. Holmes, 39 M.J. 176 (C.M.A. 1994). In *Holmes*, the Court of Military Appeals held that an 18-year-old prior drug use was not per se inadmissible due to its age. The Court of Military Appeals ultimately held that, although the evidence might be logically relevant, it failed the test of legal relevance under Rule 403, primarily because of its age. *Id. But see* United States v. Munoz, 32 M.J. 359 (C.M.A.) (uncharged misconduct at least 12 years prior to charged acts was not too old, considered as part of the Rule 404(b) analysis), cert. *denied*, 502 U.S. 967 (1991). *See infra* text accompanying notes 337-53.

[330] *Walker*, 42 M.J. at 74.

403 limitations. The problem with the Rule 403 restriction is the lack of concrete standards for trial judges to apply.[331] How does a trial judge know if he or she is abusing that discretion? By reading the case law and attempting to analogize the rules from prior cases as common law judges have been doing for centuries. Although this probably is not a problem in most cases, the divergence between Rule 404(b) and Rule 403 may have important implications in applying new Military Rules of Evidence 413 and 414.[332]

P The Special Case *of* Sex Offenses

Many commentators have noted that courts tend to be less strict in prohibiting propensity evidence in sex offense cases, particularly when the victims are children.[333] The Court of Appeals for the Armed Forces[334] has shown this same tendency.[335] Probably the best example of judicial leniency[336] in this area was the 1991 case of United States *v. Munoz*.[337]

Munoz was charged with four specifications of committing indecent acts on one of his daughters when she was approximately ten years old.[338] To corroborate the victim's testimony by showing a common scheme or plan, the government presented the testimony of her twenty-four-year-old sister, whom Munoz also had sexually abused when she was about the same age.[339] The military judge allowed the testimony, finding it "probative of a plan on the

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[331] The difficulty of applying the Rule 403 standard is aggravated by the court's own inability to keep the standard straight. In United States v. Loving, 41 M.J. 213 (1994), *cert. granted,* 116 S. Ct. 39 (1995), the Court of Appeals for the Armed Forces released the opinion in the advance sheets stating the standard one way and, apparently after receiving inquiry about the changed standard, corrected the opinion in the final version released in the hard-cover reporters. The initial version stated: "the 'probative value' of the evidence must substantially outweigh 'the danger of unfair prejudice' or confusion." Id. at 245 (advance sheet). The final version stated: "the 'probative value' of the evidence must not be substantially outweighed by 'the danger of unfair prejudice' or confusion." *Id.* at 245 (hard-cover reporter). Admittedly, *Loving* was an extremely lengthy opinion with a whole host of issues and standards to keep straight, but it was a capital case. Interestingly, this change was made without so much as a footnote to alert the reader of the variance.

[332] *See infm* text accompanying notes 399-418.

[333] *See, e.g.*, IMWINKELRIED, *supra* note 12, §§ 2:22, 4:11-4:18; Reed, *supm* note 103; Stone, *supra* note 103.

[334] Formerly the United States Court of Military Appeals. *See supm* note 8.

[335] *See* Major Stephen T. Strong, *What is a Plan? Judicial Expansion of the Plan Theory of Military Rule of Evidence 404(b) in Sexual Misconduct Cases,* ARMY LAW., June 1992, at 13.

[336] The term "leniency" here means leniency toward the government, not toward the accused.

[337] 32 M.J. 359 (C.M.A.), *cert. denied,* 502 U.S. 967 (1991).

[338] *Id.* at 360.

[339] *Id.*

accused's part to sexually abuse his children. . . ."[340] The common elements that indicated a plan were: the similarity of acts, the common situs in the home, the similar age of the victims, that other people were often present in the home, and that the accused often had been drinking at the time.[341]

Chief Judge Sullivan, writing the lead opinion for the court, easily found the sister's testimony to be legitimate evidence of a plan. He noted the "significant elements of concurrence between the uncharged acts and the charged acts which suggested a common plan."[342] Based on those "common factors," the Court of Military Appeals held the trial judge had not abused his discretion in finding the uncharged misconduct evidence admissible to prove a plan.[343] The Chief Judge easily dismissed the defense argument that the prior acts were too remote in time, having occurred at least twelve years before the charged acts. The critical element was the victim's age at the time, not the time between victims.[344] Finally, Chief Judge Sullivan distinguished *Ferguson,*[345] where the uncharged misconduct evidence had been offered to prove a fact that was not at issue in the case. Here "[tlhe critical issue . . . was the occurrence of the charged indecent acts, and evidence of appellant's plan to do such acts was probative on this point."[346]

Senior Judge Everett, in a highly critical dissent, alleged that the majority "when faced with rules of evidence that require the delicate touch of a surgeon's scalpel . . . instead [had] wielded a bludgeon."[347] In particular, he failed to see how the accused could have had a plan to molest his yet-unborn daughter at the time that he

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[340] *Id.* at 361.

[341] *Id.* The military judge also excluded the testimony of another sister, about a similar incident she had experienced, on Rule 403 grounds. *Id.*

[342] *Id.* at 363.

[343] *Id.* at 363-64.

[344] *Id.* at 364.

[345] United States v. Ferguson, 28 M.J. 104 (C.M.A. 1989). *See supra* text accompanying notes 289-98.

[346] *Ferguson*, 32 M.J. at 364. The Court of Military Appeals also addressed what it termed the "more difficult problem" of the Rule 403 balancing in this case. This was a difficult problem because the victim's sister had testified to more than just the acts similar to the instant charges. Her testimony included accounts of repeated oral and anal sodomy, "clearly more egregious and reprehensible" than the fondling alleged in the charges and referred to in the government's offer of proof as to what the sister would say. *Id.* Although the Court of Military Appeals found "[a]dmissibility of this testimony under Mil. R. Evid. 403 . . . highly questionable," it noted that the defense lack of response to the "simple overkill" suggested waiver of the issue. *Id.* at 364-65. Noting that the military judge had given a carefully-crafted limiting instruction, the Court of Military Appeals held the "overkill" had not substantially changed the outcome of the trial. *Id.* at 365.

[347] *Id.* at 366 (Everett, S.J., dissenting).

had molested the older daughter.[348] This is what would have been required under the common law definition of a common scheme or plan.[349]

In a forward-looking concurring opinion, Judge Cox suggested an approach to resolve the tension between the majority and dissenting opinions. In effect, he suggested that sex offenses are a different breed and that "[e]vidence of similar sexual conduct, particularly deviant sexual conduct such as incest, is powerful circumstantial evidence."[350] In a footnote he even expressed doubt that a person's sexuality should be called "character,"[351] hinting that sexual propensities are more like a physical characteristic, to be proven by past observation of the trait, unrestrained by Rule 404(b). Recognizing the potential dangers inherent in this kind of evidence, he stated that military judges must still apply Rule 403 to protect against unfair prejudice.[352] Finally, he noted that the proposed new Federal Rule of Evidence 414 apparently reflected his views of the relevance of an accused's past similar sexual conduct.[353] Unfortunately, only the title of the proposed rule contained the word "similar," and even if a title limits the rule, how narrowly would "similar" be defined?

V. New Federal Rules of Evidence 413 and 414

> Rule 413 (414). Evidence of Similar Crimes in Sexual Assault (Child Molestation) Cases.
>
> (a) In a criminal case in which the defendant is accused of an offense of sexual assault (child molestation), evidence of the defendant's commission of another offense or offens-

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[348] *Id.* at 367.

[349] *See* Strong, *supra* note 335, at 16-17, 21. Addressing the sodomy evidence, Senior Judge Everett said: "Only if one expands the 'common scheme or plan' concept to one that embraces *all* sexual misconduct by an accused on his children can this evidence of sodomy be deemed within Mil. R. Evid. 404(b)." *Ferguson*, 32 M.J. at 368. He appears to have foreshadowed quite accurately what new Military Rule of Evidence 414 has done in effect. What these critics of expansive application of the common scheme or plan theory fail to recognize, however, is the existence of a similar but distinct theory known as "system." *See, e.g.*, Lisenba v. California, 314 U.S. 219 (1941) (holding constitutional California's adoption of "the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system"). Under a system theory, prior similar acts can be relevant to show the existence of a system, even if the prior acts occurred before the current victim was even known to the accused.

[350] *Ferguson*, 32 M.J. at 365 (Cox, J., concurring).

[351] *Id.* at 365 n.1.

[352] *Id.* at 365.

[353] *Id.* at 366 & n.2.

es of sexual assault (child molestation) is admissible, and may be considered for its bearing on any matter to which it is relevant.[354]

A. *Origins of the New Rules*

The proposal for new rules allowing the use of similar acts evidence in sexual assault and child molestation cases arose from a concern that this "typically relevant and probative"[355] evidence was being excluded by rules modeled on Federal Rule of Evidence 404(b).[356] David J. Karp of the Ofice of Policy Development, United States Department of Justice, authored the new rules, which were initially proposed in legislation in February of 1991.[357] The first legislative attempt to enact Federal Rules of Evidence 413 and 414 was in the Women's Equal Opportunity Act bill, introduced by Representative Susan Molinari of New York and Senator Robert Dole of Kansas.[358] Despite initial failure to pass the rules, these sponsors and others continued to reintroduce the proposal as part of the Sexual Assault Prevention Act bills in the 102d and 103d Congresses.[359] The new rules also were included in President Bush's proposed Comprehensive Violent Crime Control Acts of 1991 and 1992, as well as in other bills, but each time failed to become law.[360]

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[354]FED. R. EVID. 413, 414. The two rules are virtually identical. Substituting the words "child molestation" for the words "sexual assault" in Rule 413(a), yields the text of Rule 414(a). The key evidentiary principle appears in subsection (a) which is reproduced here. The full text of Rules 413-415 appears in Appendix A of this article. Rule 415, Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation, also was part of the package of new rules, but will not be dealt with here because of its inapplicability in criminal cases.

[355]140 CONG. REC. H8992 (daily ed. Aug. 21, 1994)(statement of Rep. Molinari); 140 Cong. Rec. S12,990 (daily ed. Sept. 20, 1994)(statement of Sen. Dole).

[356]137 Cong. Rec. S3192, S3238-39 (daily ed. Mar. 13, 1991) (analysis statement accompanying rules) (described by Rep. Molinari and Sen. Dole at 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994), S12,990 (daily ed. Sept. 20, 1994), as part of the legislative history of the new rules).

[357]140 CONG. REC. H8991 (daily ed. Aug. 21, 1994)(statement of Rep. Molinari); 140 Cong. Rec. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole); Anne E. Kyl, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414, 37* ARIZ. L. REV. 659 (1995). *See also* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases,* 70 CHI.-KENT L. REV. 15 (1994) (described by Rep. Molinari and Sen. Dole, *supra,* as part of the legislative history of the new rules, along with the analysis statement cited *supra* at note 356).

[358]140 CONG. REC. at H8991 (daily ed. Aug. 21, 1994), S12,990 (daily ed. Sept. 20, 1994) (statements of Rep. Molinari and Sen. Dole).

[359]*Id.; Karp, supra* note 357, at 15-16 & n.7.

[360]Karp, *supra* note 357, at 15-16 & n.6; 140 CONG. REC. at H8991 (daily ed. Aug. 21, 1994), S12,990 (daily ed. Sept. 20, 1994) (statements of Rep. Molinari and Sen. Dole); IMWINKELRIED, *supra* note 12, § 2:22 (Supp. 1995).

Ultimately, these rules were included in the Violent Crime Control and Law Enforcement Act of 1994, which passed and became law in September of 1994.[361]

Due to objections that the new rules had bypassed the usual rule-making procedures codified in the Rules Enabling Act,[362] the final version of the bill included a delayed effective date to allow for a report and recommendations from the Judicial Conference of the United States.[363] Not later than 150 days after enactment, the Judicial Conference was to provide a report to Congress with recommendations for amending the Federal Rules of Evidence in this area.[364] If the Judicial Conference agreed with the congressional version of the rules, they would be effective thirty days later, but if the Judicial Conference disagreed, they would be effective 150 days later, absent further congressional action.[365] The new rules would then apply in trials beginning on or after that effective date.[366]

The Judicial Conference submitted its report, exactly 150 days after enactment, on February 9, 1995.367 Recommending that Congress reconsider its decision to change the rules at all, the report also provided alternative amendments to Rules 404 and 405, designed to achieve congressional intent without the "drafting ambiguities" and "possible constitutional infirmities" noted in the new rules.[368] More specifically, the report indicated concerns that the new rules would unnecessarily reduce the protections against undue prejudice by admitting "unreliable but highly prejudicial evidence" in situations where the existing rules would admit only the most probative of this evidence.[369] This would increase "the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person."[370] Another concern was the potential

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[361] Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135 (1994). *See* Karp, *supra* note 357, at 15n.*; Kyl, *supra* note 357, at 659.

[362] 28 U.S.C. §§ 2071-2077 (1994). *See, e.g.*, 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994)(inserted statement of Rep. Hughes).

[363] 108 Stat. at 2137; 140 CONG. REC. at H8991 (daily ed. Aug. 21, 1994), S12,990 (daily ed. Sept. 20, 1994)(statements of Rep. Molinari and Sen. Dole).

[364] 108 Stat. at 2137 (§ 320935(c)).

[365] *Id.* (§ 320935(d)).

[366] *Id.* (§ 320935(e)).

[367] UNITED STATES JUDICIAL CONFERENCE, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), [hereinafter JUD. CONF. REP.], *reprinted in* 56 Crim. L. Rep. (BNA) 2139 (Feb. 15, 1995). At about the same time, the American Bar Association House of Delegates adopted a resolution opposing the new rules of evidence. *See* Myrna S. Raeder, *American Bar Association Criminal Justice Section Report to the House of Delegates, reprinted in* 22 FORDHAM URB. L.J. 343 (1995).

[368] JUD. CONF. REP., *supra* note 367, *reprinted* at 56 *Crim.* L. Rep. (BNA) 2139.

[369] *Id.* at 2139-40.

[370] *Id.* at 2139.

for inefficiency and confusion of issues with each trial spinning a web of "mini-trials within trials" as the defendant tried to rebut the other acts evidence.[371]

But perhaps the most frightening concern the Judicial Conference reported was that, as many commenting attorneys noted, the new rules appeared to be mandatory, and therefore unrestrained by other rules of evidence.[372] Pointing out that the rules, as drafted, state that evidence "is admissible," without further qualifying language, the report expressed the belief that this was a colorable argument. Comparing the language of Rule 412,373 amended in the same legislation, which states that evidence "is admissible if it is otherwise admissible under these Rules," the argument becomes stronger.[374] The report went on to say that: "[i]f the critics are right, Rules 413-415[375] free the prosecution from rules that apply to the defendant — including the hearsay rule and Rule 403. If so, serious constitutional questions would arise."[376]

Because of all of these concerns, the Judicial Conference recommended against Rules 413-415. If any amendments were to be made to the rules of evidence, the Conference recommended the amendments to Rules 404 and 405 included in its report. To emphasize the degree of opposition to the new rules, the report noted the "highly unusual unanimity of the members of the Standing and Advisory Committees . . . in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice."[377]

Despite this strong opposition to the new rules, Congress took no action to change them and they took effect as scheduled in July of 1995.[378] Because of the linkage between the Military Rules of

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[371] *Id.* at 2140.

[372] *Id.*

[373] FED. R. Em. 412(b)(2).

[374] JUD. CONF. REP., *supra* note 367, *reprinted in* 56 Crim. L. Rep. (BNA) 2139, at 2140. That the different rules were passed in the same legislation arguably makes it more likely that if Congress had intended Rules 413 and 414 to be limited by the other rules, they would have said so as they did in Rule 412. In all likelihood, the different rules probably were drafted independently with little thought given to the different qualifying language.

[375] Rule 415, Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation, was part of the same legislation that enacted Rules 413 and 414, but is not addressed in this article because of its inapplicability in criminal cases.

[376] JUD. CONF. REP., *supra* note 367, *reprinted in* 56 Crim. L. Rep. (BNA) 2139, at 2140.

[377] *Id.*

[378] Criminal Law Notes, *New Military Rules of Evidence 413 and 414*, ARMY

Evidence and the Federal Rules of Evidence, these changes also were likely to apply in time to the military.[379]

B. Military Rules of Evidence 413 and 414

Military Rule of Evidence 1102 automatically incorporates changes to the Federal Rules of Evidence into the Military Rules of Evidence 180 days after their effective date, absent contrary presidential action.[380] Because the President took no action on the new rules during the 180 days, they became part of the Military Rules of Evidence — without change — on January 6, 1996.[381] However, the Joint Service Committee on Military Justice, an interservice body that proposes Military Rules of Evidence changes to the President,[382] reviewed the new rules and proposed a military-tailored version.[383] Subsection (a) of the proposed new Military Rules of Evidence would read as follows:

> Rule 413 (414). Evidence of Similar Crimes in Sexual Assault (Child Molestation) Cases.
>
> (a) In a ***court-martial*** in which the ***accused is charged*** with an offense of sexual assault (child molestation), evidence of the ***accused's*** commission of another offense or offenses of sexual assault (child molestation) is admissible, and may be considered for its bearing on any matter to which it is relevant.[384]

Comparing this version with the Federal Rule reveals only terminology changes in this key provision to adapt it for military use. Other proposed military changes include deleting Rule 415, due to

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LAW., Oct. 1995, at 25 [hereinafter Criminal Law Notes]

[379] *See supra* text accompanying notes 140-43.

[380] *See supra* note 140 and accompanying text.

[381] Criminal Law Notes, *supra* note 378, at 25. Technically, Rule 415 also was incorporated but because the Military Rules of Evidence do not apply in any civil cases, it is an addition with no practical effect. See *id.* at 25 n.1.

[382] The committee also makes other military justice recommendations to the President. *See* SALTZBURG ET AL., *supra* note 129, at xi. According to a Joint Service Committee (JSC) announcement:

> The JSC was established by the Judge Advocates General in 1972. The JSC currently operates under Department of Defense Directive 5500.17 of January 23, 1985. It is the function of the JSC to improve military justice through the preparation and evaluation of proposed amendments and changes to the Uniform Code of Military Justice and the Manual for Courts-Martial.

Meeting Notice, 60 Fed. Reg. 51,990 (1995).

[383] Notice of Proposed Amendment, 60 Fed. Reg. 51,988 (1995) (proposed Oct. 4, 1995).

[384] *Id.* (emphasis added). The complete text of the proposed Military Rules (with proposed analysis) appears in Appendix B of this article.

its inapplicability in military practice; changing the fifteen-day notice requirement to five days; including violations of the Uniform Code of Military Justice in the list of potential similar offenses; and spelling out definitions that the Federal Rule had incorporated by reference.[385] In Rule 413(d)(1), the military proposal also adds the words "without consent" to specifically exclude consensual sex offenses such as adultery and consensual sodomy.[386] These proposed changes to the Federal Rule are adaptations and are not intended to change the basic meaning or effect of the rule. Hence, the analysis that follows should apply equally to the new Federal Rules of Evidence and the proposed new Military Rules of Evidence.

VI. Swinging Pendulums; Shifting Burdens

A. Applying Rule *404(b)*

The first issue to analyze when considering the new rules of evidence is determining whether they were needed at all. In the federal courts, the type of uncharged misconduct evidence that the new rules were intended to admit is routinely admitted under Federal and Military Rules of Evidence 404(b).[387] In *Huddleston,*[388] the United States Supreme Court held that Rule 404(b) is an inclusionary rule; it only excludes uncharged misconduct offered solely to prove character.

I noted earlier the distinction between the use of the word "character" and the use of the word "propensity." In my view, this is far more significant than most commentators have admitted. What many commentators admit is that accepted "noncharacter" uses of uncharged misconduct evidence under Rule 404(b) derive their relevance from propensity assumptions.[389] Because we already recognize that the list of "noncharacter" uses in the rule is "exemplary

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[385] *Id.* at 51,989.

[386] *Id.*

[387] 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 577 (6th ed. 1994); Strong, *supra* note 335, at 13-14. *See supra* text accompanying notes 333-53.

[388] Huddleston v. United States, 485 U.S. 681 (1988). *See supra* text accompanying notes 145-67.

[389] For example, using modus operandi to identify a perpetrator assumes that person has a propensity to commit crimes the same way every time. Likewise, using prior similar acta to prove an intent to commit that kind of act generally assumes propensity to commit the prior act again. *See, e.g.*, Roger C. Park & David P. Bryden, *The Twenty-Second Annual Kenneth J. Hodson Lecture: Uncharged Misconduct Evidence in Sex Crime Cases: Reassessing the Rule of Exclusion,* 141 MIL. L. REV. 171, 175 (1993); Paul F. Rothstein, *The Federal Rules of Evidence in Retrospect: Observations from the 1995 AALS Evidence Section: Intellectual Coherence in an Evidence Code,* 28 LOY. L.A. L. REV. 1259, 1260-61 (1995).

and not exhaustive," nothing prevents other propensity-related categories from being added to that list.

Deviant sexual propensity exhibited in past conduct is more of a "characteristic" than a "character." Many courts have recognized this, some admitting the propensity under the "intent" or "motive" rubrics and some expanding the idea of a "common scheme or plan" beyond all logical limits.[390] Judge Cox's concurring opinion in *Munoz,*[391] however, illuminated the essence of my argument. By showing how probative this propensity evidence is, and at the same time questioning whether or not sexuality even belonged in the "character" realm, he shed light on where the true focus should be when applying Rule 404(b).

The essential purpose of Rule 404(b), as it has evolved through judicial interpretation, is to prevent gratuitous "mud slinging" in court. If the uncharged misconduct evidence has any relevance, other than to show "bad character," then Rule 404(b) allows it, even if it also may show "bad character." Rule 403 is still available to allow judicial discretion in how far to allow "any relevance" to go, but the evidence "is admissible," subject to that discretion. So, assuming that Rules 413 and 414 are still subject to Rule 403—not a forgone conclusion by any means—then they really do not expand the universe of admissible evidence in any favorable way.

One of the arguments in favor of the new rules was that they allow more intellectual honesty in admitting this type of evidence, rather than expecting judges to stretch or twist Rule 404(b) to admit the evidence. My argument is that the evidence is admissible under Rule 404(b), without any stretching or twisting, simply by reading the rule to mean what it says. Often the evidence falls quite easily within the "intent," "motive," or "plan" uses that most courts recognize. But even if the evidence in a particular case does not fall into one of these categories without stretching, the court can create its own category under Rule 404(b), such as "unique sexual interest"[392] or "perverse sexual desire"[393] or "lack of inhibitions from committing deviant or forcible sexual acts."[394] Courts are understandably reluc-

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[390] *See supra* text accompanying notes 333-53. See *also* Strong, *supra* note 335.

[391] United States v. Munoz, 32 M.J. 359 (C.M.A.), cert. *denied*, 502 U.S. 967 (1991). See *supru* text accompanying notes 337-53.

[392] *See, e.g.*, United States v. Rhea, 33 M.J. 413, 422 (C.M.A. 1991); United States v. Mann, 26 M.J. 1,3 (C.M.A.), cert. *denied,* 488 U.S. 824 (1988).

[393] *See, e.g.*, United States v. Bender, 33 M.J. 111, 112 (C.M.A. 1991) (quoting the trial judge's reasoning for admitting evidence of prior acts with another victim).

[394] This category would be more relevant in sex crime cases with adult victims because the desires or interests of the perpetrator might not be as unique as his mode of fulfilling them.

tant to break new ground in this area—a reluctance symptomatic of the common law system—but Rule 404(b) allows it. The key is that the evidence has some probative value other than to show the accused is a "bad person." Perhaps the judicial reluctance to creatively apply Rule 404(b) is the best reason for enacting the new rules.

One argument against my theory is that Rule 404(b) merely codified the common law rules on uncharged misconduct and the use of the word "character" instead of "propensity" was not a significant change. While the common law rule from the time of Rex *v.* Cole[395] prohibited using evidence showing an accused "had a tendency to such practices" as he was accused of, exceptions quickly arose where propensities were viewed as being fair and relevant evidence on particular points. The emergence of the "lustful disposition" exception was a case right on point.[396] The drafters of Rule 404(b) must have recognized this, and this may explain their careful choice of words. They easily could have barred "propensity" evidence instead of "character" evidence, but they must have realized that this would have been intellectually dishonest in light of the permissible purposes that they listed in the second sentence of the rule. So they chose to say "character."[397] While most courts and commentators continue to use "character" and "propensity" interchangeably, one need only think about what the words mean in everyday use to see that they are not the same.[398]

B. Applying Rules *413 and 414*

The intent of the new rules of evidence was essentially to enact a "lustful disposition" exception to Rule 404(b). Assuming that Rule 404(b) prohibits the use of propensity evidence of any kind not specifically listed in the rule, then this would be a valid purpose for new rules. After all, the "lustful disposition" exception has a long history and substantial support in both scientific data and common sense.[399] But these new rules, while crafted quite simply and understandably, did not undergo the rigorous testing to which other Federal Rules of Evidence were subjected. As the Judicial

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[395] *See supra* text accompanying notes 44-50.

[396] *See supra* text accompanying notes 103-06.

[397] The advisory committee notes are somewhat ambiguous on the definition of "character," While they use various propensity examples of 'character,'' they also highlight the "bad person" inference as the primary evil to be avoided. FED. R. EVID. 404(a) advisory committee's note.

[398] While my argument may seem radical to some, at least one prominent commentator has advanced a similar theory. See Rothstein, *supra* note 389, at 1264-65.

[399] *See* Reed, *supra* note 103, at 168-69; Stone, *supra* note 103; Karp, *supra* note 357, at 23.

Conference Report observed, they carry the baggage of ambiguity and overbreadth in their text. The results may not be what the drafters intended.

1. What Evidence Comes In? — The first question that the new rules raise is whether or not the uncharged acts admitted have to be similar to the charged offense, and if so, how similar?[400] The titles of the rules use the words "similar crimes," but this does not appear to limit the text of the rule. The apparent intent of these words is that if another offense is one in the general category of "sexual assault" or "child molestation," then it is similar. The problem with this interpretation is that it opens up a broad category of other offenses as being presumptively relevant and admissible, without considering that the dissimilarity of the other offense may make it irrelevant.[401] Rather than making the proponent of the evidence demonstrate some relevance, the new rules presume it and shift the burden of exclusion to the defense. That the defense may be able to exclude irrelevant evidence that "is admissible" under these rules is not a forgone conclusion. It assumes that Rules 402 and 403 still apply to this type of evidence, which is not clearly the case.

Undoubtedly, the drafters of these new rules, and the legislators that sponsored them throughout the law-making process, intended that Rules 402 and 403 would still apply.[402] They intended only to create an exception to Rule 404(b). But as the Judicial Conference Report noted, many attorneys have read the plain lan-

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[400] Under Rule 404(b), prior acts offered to prove intent based on their similarity to the charged acts must have more than just minimal similarity to be admitted. *See, e.g.*, United States v. Hadley, 918 F.2d 848, 851-52 (9th Cir. 1990), *cert. granted*, 503 U.S. 905, *and* cert. *dismissed*, 506 U.S. 19 (1992); United States v. Foskey, 636 F.2d 517,523-25 (D.C. Cir. 1980).

[401] For example, Rule 413 incorporates any conduct that violates chapter 109A of 18 U.S.C. into its definition of "offense of sexual assault." FED. R. EVID. 413(d)(1). That chapter includes offenses commonly known as "statutory rape" in which consent is not an issue. 18 U.S.C. §§ 2241(c), 2243(a) (1994). A prior incident of a "sexual act" or even the lesser "sexual contact" (which includes touching through the clothing) with a minor would be admissible under Rule 413 to prove a forcible rape. *See id.* §§ 2244, 2246(3). Chapter 109A also includes the offense of "abusive sexual contact" with adults. *Id.* § 2244(b). Therefore, a prior incident of sexual harassment — such as pinching someone's rear end without permission — would be admissible under Rule 413 to prove a forcible rape. The probative value of these uncharged acts to prove the charged offense is questionable. Nevertheless, the author of the new rules asserts that they "[do] not admit evidence of offenses which are dissimilar in character from the charged offense. . . ." David J. Karp, *Response to Professor Zmwinkelried's Comments*, 70 CHI.-KENT L. REV. 49 (1994) (writing in response to Edward J. Imwinkelried, *Some Comments About Mr. David Karp's Remarks on Propensity Evidence*, 70 CHI.-KENT L. REV. 37 (1994)).

[402] *See Karp, supra* note 357, at 1 9 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); 140 CONG. REC. S12,990 (daily ed. Sept. 20, 1994) (statement of Sen. Dole).

guage of the rules as overriding the other rules of evidence that might conflict with their mission of admissibility.[403] In construing a statute, one need not look to the legislative intent if the plain language is unambiguous.[404] Fortunately, the fact that different people read these rules different ways indicates that they are ambiguous. Mr. David Karp, the author of the rules, stated that they are "rules of admissibility, and not mandatory rules of admission."[405] This is also the best interpretation of the words "is admissible" in the rules.[406] While their clarity would be greater with the additional phrase "if otherwise admissible under these rules," they clearly do not mandate admission in the way that Rule 609(a)(2) does with its "shall be admitted" language.[407] Although the novelty of the language in the new rules leaves them subject to either interpretation[408] the other rules of evidence should still apply in the absence of an explicit intent to the contrary.[409]

If we assume that Rule 402 applies, does the relevance require-

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[403] *See supra* text accompanying notes 367-76.

[404] Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 808 n.3 (1989) (citing United Air Lines, Inc. v. McMann, 434 U.S. 192, 199 (1977)). *See also* James Joseph Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95, 119 n.122 (1994) (collecting United States Supreme Court cases). At least one commentator has opined that the plain language of the rules indicates that the other rules still apply. Strong, *supra* note 335, at 22 & n.114 (quoting what is now FED. R. EVID. 413(c), 414(c)).

[405] Karp, *supra* note 357, at 19.

[406] *But see* Duane, *supra* note 404, at 119 & n.121 (quoting the *Black's Law Dictionary* definition of "admissible evidence" as evidence the judge is "*bound* to receive").

[407] MCM, *supra* note 131, MIL. R. EVID. 609(a)(2). Rule 609(a)(2) states that *crimen falsi* convictions "shall be admitted" to impeach a witness and "it is widely agreed that this imperative, coupled with the absence of any balancing language, bars exercise of judicial discretion pursuant to Rule 403." Green v. Bock Laundry Mach. Co., 490 U.S. 504, 525-26 (1989). *See also* 1 SALTZBURG ET AL., *supra* note 387, at 577-78 (noting the absence in the new rules of either the mandatory language of Rule 609(a)(2) or the specific incorporation of a balancing test as in Rule 609(a)(1)).

[408] The new rules seem to strike a middle ground between Rule 404(b)'s "may . . , be admissible" and Rule 609(a)(2)'s "shall be admitted," making precedents applying to either of those rules inapplicable. The closest comparison that can be made is with Rule 404(a) which states that character evidence "is not admissible" to prove action in conformity, with three exceptions. MCM, *supra* note 131, MIL. R. EVID. 404(a). Arguably, the three exceptions would then state that certain evidence "is admissible" because that is the opposite of the rule to which they are exceptions. Because we know that the exceptions to Rule 404(a) have not caused a wholesale overruling of the other rules of evidence, the language "is admissible" should not be given that effect.

[409] The fact that these new rules were drafted and approved through a different process than the other rules to which we are comparing them decreases the weight the comparison should carry. When commentators have compared Rule 412's "is admissible, if otherwise admissible under these Rules" with the new rules' "is admissible," they apply canons of statutory interpretation to conclude that the extra language in Rule 412 could not have been intended to be superfluous. *See, e.g.*, Duane, *supra* note 404, at 118-19 & n.120. This conclusion gives the law-making process too much credit. The

ment limit the use of uncharged misconduct evidence? Probably not. In the broadest sense, any uncharged misconduct is relevant to prove any crime. The logical probative chain would be that because a person did something bad on one occasion, he or she is either a "bad person" and likely to do other bad things, or that he or she has overcome particular inhibitions on at least one occasion and, therefore, is less likely to be inhibited in the future. The first alternative is the classic "evil disposition" propensity situation, but the second alternative looks less like general propensity and more like proof of a more specific mental state. Professor Stone argued that any "similar" acts always will be relevant.[410] But if the acts are dissimilar, even if bad, they may not even satisfy the basic relevance requirement.

Because these new rules limit their scope to other offenses of the same general type, we probably can assume that any uncharged act meeting the rule's description is at least minimally relevant. But is there any kind of nexus requirement to show a tighter relevance of the prior acts to the charged acts? As we have seen, the nexus requirement that used to be a part of the Rule 404(b) equation has migrated to Rule 403.[411] The courts have applied the relevance requirement in a very nonlimiting way. The mere fact that the uncharged acts in these cases will be of the same general type as the charged offense will likely satisfy this low relevance standard.[412] The real limitation on this evidence, if any, will have to come from Rule 403.

If the intent of the new rules was to limit judicial discretion to exclude this "typically relevant and probative" evidence, it would not make sense for the new rules to remain subject to the virtually absolute judicial discretion of Rule 403. But a reading of the legislative history of these rules demonstrates that this was not the intent.[413] The primary focus of the new rules was to serve as a

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sheer volume of information included in the legislation makes it impossible for legislators to conduct a detailed comparison of every provision, especially when, as here, the provisions are added in a late amendment as part of a compromise and quickly passed with little actual floor debate. See *id.* at 95-97; Kyl, *supra* note 357, at 659 n.6.

[410] Stone, *England*, *supra* note 12, at 955-56.

[411] *See supra* text accompanying notes 288-332.

[412] Even though the relevance standard is quite low, the possibility exists that irrelevant evidence could be offered under the new rules. For example, a prior incident of unlawful consensual sex with an under-age partner could be offered to prove lack of consent in a later trial for forcible rape. A prior incident of sexual harassment pinching could be offered to prove propensity to commit rape. The relevance of this type of evidence on these issues is at least questionable. See *supra* note 401.

[413] *See* 137 CONG. REC. S3238-39 (daily ed. Mar. 13, 1991) (analysis statement accompanying rules).

[414] *See, e.g.*, Elliott v. State, 600 P.2d 1044 (Wyo. 1979), cited *in* 137 CONG. REC.

model for the states, most of which have adopted rules of evidence based on the Federal Rules. Because every state has its own courts to interpret these rules, not every state interprets them the same way. Some states interpret their version of Rule 404(b) as allowing uncharged sexual offenses to show "intent" or "motive,"[414] while other states have excluded the evidence as prohibited propensity evidence.[415] The intent of the new rules was simply to send the message to those states that this evidence is admissible. The legislative history reveals no sinister intent to force judges to admit this evidence, even if they find the danger of unfair prejudice substantially outweighs its probative value. Accordingly, the Rule 403 balancing should continue to be the focus for lawyers and judges wrestling with the admissibility of this brand of uncharged misconduct evidence, just as it has been recently in the Rule 404(b) arena.

Applying Rule 403 may allow judges to be able to avoid many of the bizarre results that could come from a strict application of Rules 413 and 414 in particular cases. For example, a prior incident of sexual harassment might meet the minimal relevance requirement to be admissible in a rape case.[416] But the judge could weigh its probative value as minimal and exclude it to avoid the substantial danger of unfair prejudice, or even just the potential for confusion of issues and waste of time that it presents.[417] Other examples of potentially admissible acts that the judge could exclude on Rule 403 grounds might include sexual acts or contacts coerced as part of a fraternity initiation or consensual sexual acts or contacts unknowingly committed with a minor. The decision would have to be particular to the case, with the judge considering whether or not the uncharged acts had any real (as opposed to minimal) probative value to the issues in the case. In the final analysis, judges will continue to have discretion and the actual impact of these new rules ultimately will depend on how judges exercise that discretion.[418]

2. *How Will* the Evidence Come In? — Assuming that we can

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at S3239.

[415] *See, e.g.*, Getz v. State, 538 *k 2 d* 726 (Del. 1988), **cert. denied,** 506 U.S. 924 (1992), *cited* **in** 137 CONG. REC. at S3240.

[416] *See supra* notes 401, 412.

[417] MCM, *supra* note 131, MIL. R. EVID. 403. Rule 403 reads as follows: 'Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

[418] *See* 140 CONG. REC. H8968, H8992 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); 140 CONG. REC. 512,990 (daily ed. Sep. 20, 1994) (statement of Sen. Dole).

[419] *See supra* text accompanying notes 402-09. **See** *also* Duane, *supra* note 404,

determine which uncharged acts are relevant and probative in a given case, the next question is how to present them to the court. Again here, the imprecise drafting of the new rules leaves unanswered questions. By stating that this evidence "is admissible," the rules might be interpreted not only as overriding Rules 402 and 403, but also as overriding any other rules that normally restrict admissibility.[419] This could include lifting the general prohibition on hearsay evidence, overriding any "best evidence" or authenticity restrictions, and even shortcircuiting the rules restricting opinion testimony.

As we have found, this was neither the drafters' or sponsors' intent.[420] Assuming that the words "is admissible" are sufficiently ambiguous to allow resort to legislative intent, most of these problems will be solved.[421] "he hearsay rule will still apply, as well as most other restrictions on the form of admissible evidence. But one very significant problem cannot be solved so easily.

Putting aside my argument that "character" is not the same thing as "propensity," under the conventional approach, Rules 413 and 414 actually override not only Rule 404(b) but Rule 404(a). The new rules specifically allow the uncharged acts as evidence for any relevant purpose, including to prove propensity or disposition, which is conventionally regarded as "character evidence." Yet the new rules do not add an exception to Rule 404(a)'s limitations on character evidence. Even if you assume a new exception into Rule 404(a), this raises more questions about applying Rule 405. Rule 405(a) requires that any proof of character be made only by reputation or opinion evidence, not by specific acts evidence. The drafters of the new rules did not intend that proof of the uncharged offenses had to be in the form of reputation or opinion, but the imprecision of their rules has created this confused state of the law. At the very least, a prosecutor

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at 119.

[420] *See supra* text accompanying notes 402-09.

[421] Even assuming the other rules of evidence still apply, some of the conflicts cannot be resolved. *See* Duane, *supm* note 404, at 115-20. The most serious is the conflict between the new rules and the character evidence rules discussed *infra*. Another irreconcilable conflict would remain between the new rules and the witness impeachment rules. Rules 608 and 609 strictly limit available impeachment methods, including Rule 608(b)'s prohibition on extrinsic evidence of prior acts not resulting in a conviction. MCM, *supm* note 131, MIL. R. EVID. 608, 609. The new rules, on the other hand, state that prior acts evidence "may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 413, 414. Because prior offenses are at least minimally probative of credibility, once prior offense evidence is admitted under the new rules, the "may be considered" language would allow use of the evidence for purposes prohibited under Rules 608 and 609. See Duane, *supra* note 404, at 116 & n.110.

can make the argument that such reputation and opinion evidence is now admissible to prove the now-permitted character traits of the accused. This is a conflict that cannot be interpreted away. The rules require some further amendment.

Among the less-taxing questions about how to admit the evidence are the issues of standard of proof and limiting instructions. First, a court should not need to give any limiting instructions because the new rules specifically say the use of the evidence is not limited except by relevance concerns.[422] As far as the standard of proof is concerned, the analogous nature of the uncharged acts evidence admitted under the new rules and under Rule 404(b) indicates that the same standard should apply. In *Huddleston,* the Supreme Court clarified that no elevated standard of proof should be read into Rule 404(b).[423] All that was required was that there be sufficient evidence for the jury to reasonably conclude by a preponderance of the evidence that the uncharged acts occurred. This was evident, the Court said, in Rule 104(b)'s standard for "relevancy conditioned on fact."[424] The Court of Military Appeals applied this same analysis in *Mirandes-Gonzalez,* rejecting the prior "clear and convincing" standard in favor of a preponderance standard.[425] Because the relevancy of uncharged acts evidence under Rules 413 and 414 is conditioned on the accused actually having committed the uncharged acts, the same preponderance standard should apply to the new rules as well.

C. constitutional Questions

Constitutional challenges to the use of uncharged misconduct evidence historically have focused on the rules "as applied" in particular cases.[426] Courts have refused to hold that Rule 404(b) is

[422] *See* MCM, *supm* note 131, MIL. R. E m . 105.

[423] Huddleston v. United States, 485 U.S. 681 (1988). See *supra* text accompanying notes 145-67.

[424] Military Rule of Evidence 104(b) reads as follows:

> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a fmding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except where these rules or this Manual provide expressly to the contrary.

MCM, ***supra*** note 131, MIL. R. E m . 104(b). The first sentence of the rule is identical to the Federal Rule of Evidence, except that the word "court" was changed to read "military judge." FED. R. EVID. 104(b). The second sentence was added to the Military Rule of Evidence to clarify the role of the judge in deciding admissibility. MCM, ***supm*** note 131, MIL. R. EVID. 104(b) analysis, app. 22.

[425] United States v. Mirandes-Gonzalez, 26 M.J. 411 (C.M.A. 1988). See ***supm*** text accompanying notes 275-82.

[426] *See* IMWINKELRIED, ***supra*** note 12, § 10:01.

facially unconstitutional simply because it allows admission of evidence that might tend to undermine the presumption of innocence or the double jeopardy bar.[427] Rules 413 and 414 have yet to be tested, however, and the ease with which they seem to brush aside a centuries-old tenet of our jurisprudence inevitably will invite constitutional challenges.

1. Due Process—The landmark Supreme Court case of In *Re Winship*[428] established that the Due Process Clause requires the government to prove the accused's guilt beyond a reasonable doubt. This requirement, the Court said, 'provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law."[429] The Court highlighted two important interests that this high standard serves: the value that our society places on the good name and freedom of every individual, and the need for the community to accept the criminal justice system as fair and just.[430] If the community believes that the system can easily convict an innocent person, the legitimacy so necessary to a democracy suffers.

Federal courts have long held that the general exclusion of uncharged misconduct evidence is an enforcement mechanism for the presumption of innocence and the high standard of proof required to overcome it.[431] *As* one court stated, "When such evidence inadvertently reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk."[432] These courts have recognized that uncharged misconduct is often relevant to the case at bar to prove something other than "bad character," and in those cases the government's use of the evidence satisfies due process, so long as the judge has applied a proper Rule 403 balancing.[433] But when the government offers uncharged misconduct evidence solely to prove "bad character," the courts hold that the presumption of innocence has been offended.

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[427] *Id.*

[428] 397 U.S. 358 (1970).

[429] *Id.* at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

[430] *Id.* at 363-64.

[431] *See, e.g.*, United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985); United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980); United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977), cert. *denied*, 439 U.S. 847 (1978); Government of Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976).

[432] *Toto*, 529 F.2d at 283.

[433] *See, e.g., Foskey*, 636 F.2d at 523; *Toto*, 529 F.2d at 283.

The Supreme Court has yet to decide this issue. In ***Estelle v. McGuire,*** the Court specifically noted that it had not reached the issue.[434] But as long ago as 1967, Chief Justice Warren had little doubt about it. In his separate opinion in ***Spencer v. Texas***,[435] he stated that:

> While this Court has never [sol held . . . our decisions [and those of other courts] suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence. . . .[436]

The new rules will raise this question directly, giving the Court little opportunity to avoid the issue.[437] They specifically allow uncharged misconduct evidence—including, but not limited to, prior convictions—to be admitted solely to prove the accused's propensity to commit a particular type of crime. The reason these rules will survive this challenge—if they do—is Rule 403. If judges still have the discretion to exclude evidence that is unfairly prejudicial, this can be the safeguard that prevents unconstitutional application of Rules 413 and 414. Because the uncharged acts evidence is relevant in at least some cases, as indicated by its frequent admission under Rule 404(b), the new rules should not be found to be facially invalid. That the uncharged acts evidence need not be proven beyond a reasonable doubt will invite the charge that the new rules lower the burden of proof the government must meet to prove guilt. But this argument will not likely carry any more weight than the analogous argument against Rule 404(b) evidence, which has been routinely rejected by the courts.[438]

Why is Rule 403 the key to constitutionality for the new rules? After all, drafter David J. Karp argues correctly that the genesis of the uncharged misconduct rule was the desire to give "fair notice" of the charges and to limit the scope of trials.[439] He argues that because a notice provision and a scope restriction have been built into the new rules, they should satisfy due process.[440] Mr. Karp

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[434]502 U.S. 62, 75 n.5 (1991). ***See supra*** text accompanying notes 217-26.

[435]385 U.S. 554, 569 (1967) (Warren, C.J., dissenting in part, concurring in part).

[436]*Id.* at 572-75.

[437]*See* Duane, ***supra*** note 404, at 107-08 & n.71.

[438]*See* IMWINKELRIED, ***supra*** note 12, § 10:11. *Cf.* Dowling v. United States, 493 U.S. 342, 352-54 (1990). ***See supra*** text accompanying notes 168-80, 212-16. ***See also*** DOJ REPORT, ***supra*** note 44, ***reprinted in*** 22 U. MICH. J.L. REF. 707, at 749 & n.102.

[439]Karp, ***supra*** note 357, at 27. ***See supra*** text accompanying notes 27-30.

[440]Karp, ***supra*** note 357, at 21-22.

states that the idea of preventing undue prejudice is overrated and claims that the "prejudice' idea may have originated as a rationalization for an established rule that arose for different reasons."[441] He also correctly notes that the local juries in old England were often well-acquainted with the characters of the parties, therefore, prejudice could not have been a major factor in restricting uncharged misconduct evidence.[442]

While Mr. Karp's observations are true up to that point, he overlooks the trend that Blackstone recorded toward jury impartiality as a fundamental fairness concept.[443] Mr. Karp argues that jury knowledge of the parties naturally decreased due to urbanization and population growth. This, he says, led to a relaxation of the uncharged misconduct prohibition to give the unfamiliar jury relevant knowledge about the parties in other ways.[444] But Blackstone's observations point out that the decrease in juror knowledge of the parties was not a mere accident of growth, but a intentional trend, fostered in pursuit of the impartiality necessary for fair decisions, which in turn gave the system legitimacy.[445] Professor Stone's observations illustrate that, rather than relaxing the uncharged miscon-

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[441] *Id.* at 27-28. The Justice Department Report that Mr. Karp cites heavily in his defense of the new rules summarily dismisses a due process challenge to admitting criminal histories at trial. DOJ REPORT, *supra* note 44, *reprinted in* 22 U. MICH. J.L. REF. 707, at 748-49. The Report states:

> [Tlhe 'fair trial" arguments all rest on the unsupported empirical assumption that prior-crimes evidence is likely to result in unjustified convictions based on antagonism or to be taken by the trier for more than it is rationally worth. Because there is no reason to believe this is the case, there is no basis for implying special constitutional restrictions on the use of such evidence based on concerns over prejudice.

Id. at 749 (citations omitted). The report bases this claimed lack of prejudice in part on the Kalven and Zeisel jury study. *Id.* at 732-33 (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966)). This presents an excellent example of the maxim that "You can prove anything with statistics." The authors of the study themselves concluded, and many have cited the study for the proposition, that their results lend "support to the legal tradition which so closely guards the disclosure of a prior record in a criminal case." HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 389-90 (1966). *See* Weissenberger, *supra* note 18, at 581 & n.10; David P. Leonard, *The Federal Rules of Evidence and the Political Process,* 22 FORDHAM URB. L.J. 305, 325 & n.100 (1995). *But see* Park & Bryden, *supra* note 389, at 188 (noting that the study data actually show prejudice against victims in consent defense rape cases). The Justice Department Report recognized the contrary conclusion of Kalven and Zeisel and dismissed it as ill-founded. DOJ REPORT, *supra* note 44, *reprinted in* 22 U. MICH. J.L. REF. 707, at 733 n.49. With the number of times "common sense" has been used to justify the new rules, however, one would think that it also could be used to determine that criminal history evidence will be somewhat prejudicial, even without jury study results.

[442] Karp, *supra* note 357, at 28-29.

[443] *See supra* text accompanying notes 31-39.

[444] Karp, *supra* note 357, at 28-29.

[445] *See supra* text accompanying notes 31-41.

duct prohibition, the courts actually were tightening it from the original nonlimiting version of the rule that evolved from the Treason Act of 1695.[446]

Examining this history in perspective, we can more easily see why the drafters of the Bill of Rights saw fit to specifically require trials by an "impartial jury" as part of the Sixth Amendment.[447] Preventing undue prejudice was an important objective for a fair system that respected the rights of the accused, not a mere "rationalization" for the uncharged misconduct rule. The Founding Fathers were living in the time of Blackstone. Undoubtedly, many of them had read his *Commentaries*. They knew that in their fledgling democracy, the government would have to have legitimacy to survive. Providing a fair trial by an impartial jury was a prerequisite to that legitimacy, not an accident of poor drafting.

As Justice White observed in *Dowling v. United States*,[448] the primary effect of the Due Process Clause is to enforce the "specific guarantees enumerated in the Bill of Rights."[449] The Sixth Amendment's specific guarantee of an "impartial jury" dictates that any procedure that denies the accused an impartial jury will violate due process. If a court admits evidence for no other purpose than to

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[446] *See supra* text accompanying notes 42-55.

[447] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."). Even though Article III of the Constitution does not mention the word 'impartial," U.S. CONST. art. 111, § 2, cl. 3, the drafters must have been thinking about the concept even before it appeared in the Bill of Rights. Alexander Hamilton referred to the jury as "a barrier to the tyranny of popular magistrates in a popular government." THE FEDERALIST NO. 83, at 332 (Alexander Hamilton) (New York, McLean 1788). For a jury to be a "barrier" to the oppression of individuals by the masses, some safeguards would be required to ensure the impartiality of that jury.

While the Sixth Amendment right to an impartial jury may not apply directly to a court-martial setting, Congress, the President, and the courts have provided a military accused with a system of rights known as 'military due process." Generally, these rights are thought to be at least as protective as the analogous constitutional rights. Among them is, Article 25 of the Uniform Code of Military Justice, 10 U.S.C. § 825 (1994), which includes restrictions on the qualification of members based on circumstances that would prevent them from being impartial. *See* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE §§ 1-1(B), 8-3(C)(1), 15-10(B), 15-10(C)(2) (3d ed. 1992 & Supp. 1995). Rule for Courts-Martial 912(f)(1)(N) specifically states:

> (1) A member shall be excused for cause whenever it appears that the member: . . . Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

MCM, *supra* note 131, R.C.M. 912(f)(1)(N). *See also* United States v. Lake, 36 M.J. 317 (C.M.A. 1993); United States v. Brown, 34 M.J. 105 (C.M.A. 1992).

[448] 493 U.S. 342 (1990).

[449] *Id.* at 352-53. *See supra* text accompanying notes 212-16.

sling mud on the accused, then the jury can no more be impartial than if they came into the courthouse with that prior knowledge of the accused.[450] This analysis gives constitutional dimension to Rule 403's balancing test. The drafters of the rules of evidence realized that all evidence of uncharged misconduct could be at least minimally probative of guilt. Rule 404(b) excluded use of this evidence on a mere "bad character" theory. But some evidence of propensity was actually highly probative, so some other safeguard was necessary to prevent mudslinging, while allowing the really probative evidence in. Rule 403 is just such a safeguard. While it allows the trial judge substantial discretion, it also allows the trial judge to prevent an unconstitutional character assassination which could serve no other purpose than to prejudice the jury.

The Due Process Clause also incorporates a "fundamental fairness" requirement that transcends the specific guarantees of the Bill of Rights, although this test is applied sparingly.[451] This raises the further question of whether or not the new rules of evidence might be "fundamentally unfair." When we look at the values embodied in our system of justice, we have to ask ourselves if rules that allow evidence of a person's life history to prove "bad character" are consistent with those values. Our tradition has long rejected the inquisitory system in favor of the accusatory system.[452] When someone mentions "the Spanish Inquisition" or recalls the question from the McCarthy Hearings "Are you now or have you ever been a member of the Communist Party?" we cringe in the belief that this is somehow unfair in and of itself. But many other countries currently use an inquisitory system, and they tend to believe that it is a better vehicle for finding the truth and avoiding "lawyer tricks."[453]

While this is a tempting lure, and many aspects of our own system have become more inquisitory,[454] we must resist the temptation

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[450]Professor Imwinkelried also has pointed out that if jurors ultimately convict the accused because of his or her prior criminal activity, despite reasonable doubts about the charged offense, this will violate the Eighth Amendment as well. U.S. CONST. amend. VIII; Edward J. Imwinkelried, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment off on the Right Foot,* 22 FORDHAM URB. L.J. 285, 291 (1995). The Supreme Court has held that the Eighth Amendment ban on cruel and unusual punishment prohibits criminalizing a person's status. *Id.* (citing Robinson v. California, 370 U.S. 660 (1962)). *But see* Norman M. Garland, *Some Thoughts on the Sexual Misconduct Amendments to the Federal Rules of Evidence,* 22 FORDHAM URB. L.J. 355, 356 & n.10 (1995) (asserting that the "status" argument "does not present a serious threat to the amendments' validity").

[451]*Dowling,* 493 U.S. at 352-53.

[452]*See supra* text accompanying notes 12-43,

[453]LAWRENCE M. FRIEDMAN, *AMERICAN* LAW 68-70 (1984).

[454]For example, one area that has become more inquisitory is family court proceedings. *Id.*

to believe that "truth" is the primary objective of our judicial system.[455] The high value we have consistently put on the Due Process Clause pointedly demonstrates that our emphasis is on fairness, far more than on truth. If we abandon that fairness to try to convict a few more criminals,[456] then we lose a large part of the legitimacy of this wonderfully crafted democracy. As Blackstone said, "[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer."[457] That is the principle behind our system of justice. It might not be too popular at a time when the focus is on victim's rights. But if our system convicts an innocent person, is that person not a victim?

2. *Equal* Protection — hother constitutional issue is whether or not the new rules violate the equal protection guarantee incorporated into the Fifth Amendment's Due Process Clause.[458] *An* equal protection analysis could apply under at least two different theories. First, the new rules treat persons accused of crimes differently based on the type of crime alleged. Second, the new rules treat the parties to the case differently in two ways. Read in conjunction with Rule 412, the new rules allow the government to offer evidence of the accused's sexual history while preventing the accused from offering evidence of the victim's sexual history except in limited circumstances.[459] Furthermore, the new rules allow the government to offer specific acts evidence to prove the accused's criminal character or propensity, but do not allow the accused to rebut this evidence except with reputation or opinion evidence under Rule 405.[460]

Before analyzing these theories of disparate treatment sanc-

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[455] *See* Weissenberger, *supra* note 18, at 587 & n.31 ("[T]he idea of statistical accuracy is fundamentally at odds with the value in our legal system of justice or fairness to individual litigants.").

[456] Some commentators believe that instead of convicting more criminals, the new rules will primarily help convict more innocent people. See, *e.g.*, Duane, *supra* note 404, at 99-101, 107-11.

[457] 4 BLACKSTONE, *supra* note 13, at *352.

[458] *See* Bolling v. Sharpe, 347 U.S. 497 (1954). See *also* IMWINKELRIED, *supra* note 12, § 10:28.

[459] *See* MCM, *supra* note 131, MIL. R. EVID. 412. See *also* IMWINKELRIED, *supm* note 12, § 10:31.

[460] *See* MCM, *supra* note 131, MIL. R. EVID. 405. See *also* IMWINKELRIED, *supm* note 12, § 10:29; Duane, *supra* note 404, at 122-24. Professor Duane also cites the new rules' disparate treatment of Native Americans in light of the fact that the new Federal Rules of Evidence will only apply to federal sex offense cases, most of which are prosecuted for violations committed on Indian lands. *Id.* at 113-15. He does not argue this disparate impact alone violates equal protection and, even if it did, this would not be a significant issue for the Military Rules of Evidence. Because the Military Rules of Evidence apply to all courts-martial, and the armed forces are generally composed of a representative cross section of the population, the Military Rules should not have any similar disparate impact.

tioned by the new rules, we must determine what level of scrutiny the Supreme Court would apply. The three traditional tests in this area are strict scrutiny, intermediate scrutiny, and rational basis.[461] Strict scrutiny generally only applies when the disparate treatment impinges on a fundamental right or is based on a suspect classification, such as race.[462] Intermediate scrutiny has generally applied only in gender discrimination cases.[463] The rational basis test—whether or not the classification is rationally related to a legitimate state interest-covers all other cases. While some commentators have assumed that evidence rules need only satisfy the rational basis test, Professor Imwinkelried has argued that a stricter scrutiny should apply in criminal cases.[464] He rests this argument primarily on a line of cases that indicate the accused has a fundamental right to present defense evidence, implicit in the Sixth Amendment. So any government-imposed classification restricting this right unequally would require at least an intermediate scrutiny analysis.[465]

The first classification theory—treating different crimes differently—seems to require no more than a cursory rational basis analysis.[466] To ask if it is constitutional to burden those accused of certain crimes more than those accused of other crimes seems an easy question to answer. Every crime has different elements and different punishments. Treating different crimes differently easily satisfies the rational basis test on these counts. But what is the legitimate state interest in applying different rules of evidence to the process of trying a person for certain crimes? At this low level of scrutiny, the interest of convicting sex offenders and child molesters is at least legitimate. Because of the demonstrated predictive quality of the evidence admitted under the new rules, the Supreme Court most likely would find the new rules at least rationally related to this legitimate state interest. The problem with the legislative history of these new rules is that they lack any kind of legislative facts to support the predictive quality of the past offense evidence in these types of cases. The drafters seemed to rely mostly on common sense and anecdotal evidence in specific cases, rather than on any kind of sci-

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[461] IMWINKELRIED, *supm* note 12, § 10:28. *See also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 612-22 (1986).

[462] IMWINKELRIED, *supra* note 12, § 1028.

[463] *Id. See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

[464] IMWINKELRIED, *supra* note 12, § 10:28.

[465] *Id.*

[466] The rules do not restrict the fundamental right to present a defense except in the Rule 412 and Rule 405 contexts, which will be dealt with next.

entific evidence.[467] While the historical admissibility of this type of evidence probably will demonstrate its probative value, the case would be stronger with some additional evidence. Even additional legislative facts might not help if the Court applies a heightened level of scrutiny. Because the new rules arguably impinge on the fundamental right to an impartial jury, the Court might apply strict scrutiny and would be unlikely to find these rules necessary to serve a compelling state interest. Rule 404(b) admits the same evidence in most cases that the new rules would admit, but in a more limited and tailored way.[468] "his indicates the new rules of broader admissibility are simply unnecessary.

The second classification theory — treating the accused differently from the government — presents a more challenging constitutional question. In *Green v. Bock Laundry Machine Co.*,[469] the Supreme Court recognized that the Fifth and Sixth Amendments established an unequal scheme of trial rights as between the prosecution and the defense.[470] But in that scheme, the accused always came out with greater rights than the government. This reflected the Framers' intent to ensure fair criminal trials. The Court also pointed out that "civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause."[471] The inevitable conclusion is that a criminal accused must enjoy *at least* the trial rights that the government enjoys, and, in some cases, enjoys more rights.

When we apply this analysis to Rules 405, 412, 413, and 414, a certain inequality emerges. Rule 412, which applies in cases of alleged sexual misconduct, prevents the defense from presenting evidence of an alleged victim's sexual history except in very limited circumstances where such evidence would be relevant to a nonchar-

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[467] *See, e.g., Karp, supra* note *357,* at 20. The only statistic that I could find appeared in a footnote citing survey results showing that 'offenders imprisoned for rape were *10.5* times more likely to be arrested for rape within three years of release than offenders imprisoned for other offenses." *Id.* at 22 n.36 (citing BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN *1983* 2, 6 (1989)). On the other hand, opponents of the new rules have cited similar surveys for the opposite proposition. *See, e.g.*, Duane, *supra* note 404, at *113* (noting that "a substantial body of empirical research . . . suggests that the recidivism rate for sex offenders is actually *Lower* than for most other categories of serious crimes," and citing IMWINKELRIED, *supra* note 12, § 4:16 (collecting studies)); Park & Bryden, *supra* note 389, at 192 (apparently citing the same study cited by Karp, *supra,* for the proposition that "the recidivism rate was *Lower* for sex offenders than for most other categories.").

[468] *See supra* text accompanying notes 387-98.

[469] 490 U.S. 504 (1989).

[470] *Id.* at 510.

[471] *Id.*

acter purpose.[472] As we have seen, new Rules **413** and **414** specifically allow the government to present evidence of the accused's sexual history, even when its only relevance is to prove character.[473] Working together, these rules restrict the accused's right to present a defense far more than they restrict the government's right to present evidence, impinging on that fundamental right that may then invoke a heightened level of scrutiny.

Drafter David Karp dismisses such an equal protection claim as "superficial" and such comparisons as "facile equations," arguing that the policies and realities behind the rules are different.[474] He says that Rule **412** promotes victim cooperation and protects victim privacy; therefore, a similar rule is unnecessary for criminal defendants because we do not need their cooperation and their sex crimes are not private acts.[475] He also distinguishes the rules in terms of the probative value of the evidence they restrict or admit. According to Mr. Karp, Rule **412,** keeps out the normal sexual history of the innocent victim, while Rules **413** and **414** allow sexual history evidence that shows that the accused is "in a small class of depraved criminals."[476]

While Mr. Karp's analysis is appealing, these rules remain inconsistent. The basic premise behind Rule **412** is that general character is not probative of conduct on a particular occasion. In other words, just because the victim of a sex crime might have "loose morals" and be prone to consent to sex acts in almost any situation, this does not prove that this victim consented to the sex act with the accused. Rules **413** and **414** take the opposite view that even general character can be probative of conduct, so that even prior **sex** offenses that are completely dissimilar to the charged offense can be admitted to prove the charged offense. This inherent inconsistency will likely cause the new rules to fail any kind of stricter scrutiny than the mere rational basis test. Considering the lack of necessity for these new rules, this blatantly unequal treatment preventing the accused's use of character evidence on the very theory that they allow the government's use of character evidence denies equal protection to the accused.

Mr. Karp's analysis fails to address the unequal treatment inherent in the inconsistency between Rule **405** and the new rules.

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[472] MCM, *supra* note 131, MIL. R. EVID. 412.

[473] *See supra* text accompanying notes 399-412.

[474] Karp, *supra* note 357, at 23-24. ***See also*** **Park** & Bryden, *supra* note 389, at 191 (rejecting this equating of the accused's and the victim's sexual histories).

[475] Karp, *supra* note 357, at 23-24.

[476] *Id.* at 24.

While Rules 413 and 414 will allow the government to present specific acts evidence to prove the accused's character, they do not provide a similar exception to Rule 405 for the accused to rebut that evidence. While some judges likely would allow the accused to present specific acts evidence to rebut specific acts evidence in the name of fairness, the rules do not require this; they prohibit it unless the new rules are interpreted to override Rule 405 completely. If an accused were prevented from using such evidence, this would result in another likely equal protection violation. Fortunately, this is also one of the new rules' easiest problems to solve by a simple amendment allowing like-kind rebuttal.[477]

3. *Double* Jeopardy—The final constitutional issue is whether or not the new rules violate the Double Jeopardy Clause. If an accused is tried and acquitted for a sexual offense, the law generally prevents a retrial for the same offense.[478] But under Rules 413 and 414, the government could charge this accused with another offense, with or without substantial evidence to prove it, and then present the evidence of the prior-acquitted offense to prove guilt of the new offense. Arguably, the jury in the new trial could find the evidence of the new offense too tenuous to convict, but convict anyway because the accused's past shows that he or she deserves it.[479]

Initially, the Supreme Court's decision in *Dowling v.* United *States*[480] seems to indicate this is not a double jeopardy violation.[481] After all, a finding of "not guilty" is not the same as a finding of innocence. The accused could have actually committed the prior act and the government simply failed to prove it beyond a reasonable doubt. If the evidence allows the new jury to reasonably conclude that the accused committed the prior offense, the evidence would be admissible under Rule 404(b) despite the prior acquittal. So why should any different result apply under the new rules?

One of the key factors in deciding that the prior-acquitted act evidence was proper was the limiting instruction the court gave to the jury in the second trial.[482] Rule 404(b) evidence is admitted only for a limited noncharacter purpose, when it comes in. Under the new rules, however, no such limits exist. Unless the court instructs the jury that they may not use the prior act evidence to infer that the

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[477]*See* Duane, *supra* note **404,** at **124.**

[478]*See supra* text accompanying notes 168-211.

[479]This situation also raises the Eighth Amendment issue addressed earlier. **See** *supra* note **450.**

[480]493 U.S. **342** (1990).

[481]*See supra* text accompanying notes 168-80.

[482]*Dowling,* **493** U.S. at **346, 353.**

accused is a "bad person" deserving of conviction and punishment, chances are good that the jury will use the evidence as they see fit.

If juries are allowed to convict an accused based on little more than the evidence presented at a prior trial, this will violate double jeopardy. Even if the second trial is nominally for a different offense, if the evidence of the different offense is lacking, the second trial will really be a retrial of the first offense.[483] Trial judges should be able to prevent this kind of inquisition in their courtrooms, by holding the government to their burden of producing evidence of the charged offense. If all the prosecutor has to prove the charged offense is a prior-acquitted offense, the trial judge should grant a motion for a finding of not guilty to prevent an unconstitutional application of the new rules.[484]

D. Policy Questions

David J. Karp justifies the new rules based on common sense and public policy.[485] He argues that what has been called the "doctrine of chances"[486] shows that the uncharged misconduct evidence admitted by these rules will be especially probative. The theory is that the odds are against a person being falsely accused of similar offenses on more than one occasion. So if the government can offer evidence of a prior accusation, this shows a higher probability that the charged accusation is not false. As he states it, "It would be quite a coincidence if a person who just happened to be a chronic rapist was falsely or mistakenly implicated in a later crime of the same type."[487]

One problem with his analysis on this point is that the new rules require neither that the accused have been proven to be a rapist in the past, nor that his status be chronic. Rules **413** and **414**

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[483] *Cf.* Grady v. Corbin, 495 **U.S.** 508 (1990), ***overruled by*** United States v. Dixon, 509 U.S. 688 (1993). ***See supra*** text accompanying notes 181-95. ***But cf.*** United States v. Felix, 503 U.S. 378 (1992). ***See supra*** text accompanying notes 196-211.

[484] Rule for Courts-Martial 917 requires the military judge to enter a fmding of not guilty of an offense when "the evidence is insufficient to sustain a conviction of the offense affected." MCM, ***supra*** note 131, R.C.M. 917(a). Although the standard is lenient for the government to clear this hurdle, it does require "some evidence which, together with all ***reasonable*** inferences and applicable presumptions, could ***reasonably*** tend to establish ***every essential element*** of an offense charged." *Id.* R.C.M. 917(d) (emphasis added). While prior-acquitted offense evidence could legitimately help corroborate evidence of a currently charged offense, the government must offer some evidence of the current offense to clear this hurdle.

[485] *See* Karp, ***supra*** note 357, at 19-21.

[486] *See* IMWINKELRIED, ***supra*** note 12, § 5:25.

[487] Karp, ***supra*** note 357, at **20.**

would allow any admissible evidence[488] that the accused had committed even one other offense of the same general type. A prior allegation of sexual harassment seems to have but the very weakest probative value to prove a later rape.[489] But more alarming than the mere overbreadth of the new rules is the message that they send about our system of justice. Are we willing to sacrifice our sacred ideals of due process in favor of a system that allows convictions based on "rounding up the usual suspects?"[490] Merely because a person may have been accused of an offense in the past, do we want to forfeit their entitlement to the full protection of our Constitution? Certainly the person's past may suggest that further investigation is warranted, but their past alone should not be enough to convict them in a system that claims to afford due process of law.

Mr. Karp's second common-sense argument is that the uncharged offense evidence shows a propensity towards a particular type of deviant behavior.[491] This argument is far more agreeable on an instinctive "gut feeling" level. We all probably accept that people who commit violent sex crimes and molest children are different than the rest of us. The historically recognized "lustful disposition" exception embodied that belief.[492] The problem again is primarily the overbreadth of the new rules. Would we all still agree that a person accused, but not convicted, of "acquaintance rape"[493] has the

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[488]This discussion assumes that the intent of the rules prevails and that they are restricted by the other rules of evidence in terms of what evidence is admissible. *See supra* text accompanying notes 400-25.

[489]*See supra* notes 401, 412.

[490]*But see* Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases,* 22 FORDHAM URB. L.J. 271, 273 (1995)(arguing that while this may be a danger in many cases, it would not be a danger in consent defense rape cases where the accused does not dispute that he is the perpetrator of the acts).

[491]Karp, *supra* note 357, at 20.

[492]*See supra* text accompanying notes 103-06, 390-99. In the psychiatric profession, "paraphiliacs" are those people who have "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving (1) nonhuman objects, (2) the suffering or humiliation of oneself or one's partner, or (3) children or other nonconsenting persons" AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 522-23 (4th ed. 1994) (commonly known as the DSM-IV). "By definition, the fantasies and urges associated with these disorders are recurrent. . . . The disorders tend to be chronic and lifelong. . . ." *Id.* at 524-25. *But see* Imwinkelried, *supra* note 450, at 297-98 (questioning the real probative value of this evidence citing statistics showing lower recidivism rates than for other crimes); IMWINKELRIED, *supra* note 12, § 4:16 (noting the common belief among laypersons and some medical authorities that sex offender recidivism rates are higher than for other offenses and citing more recent research discrediting this belief). *See supra* note 467.

[493]For example, the accused and the alleged victim had been dating for some time and the accused thought it was time for the relationship to become sexually intimate. Without securing a clear consent, the accused had intercourse with the somewhat intoxicated victim. Later the victim charged the accused with rape, but the jury

same propensity as a violent "power" rapist?[494] The broad definition of "sex offenses" in the new rules allows the use of evidence with much less probative value than the billboard examples used to sell them.

Mr Karp's public policy argument highlights the strong need for this type of evidence in these types of cases, noting the secretive nature of the crimes, the reluctance of victims to report and testify, and the danger these criminals present to the public.[495] Specifically, he notes two key proof problems in these cases that uncharged offense evidence will help solve: rebutting a defense claim of consent in rape cases, and bolstering the credibility of child witnesses in child molestation cases.[496] While these proof problems are real, and have caused many a prosecutor to offer uncharged misconduct evidence under a Rule 404(b) noncharacter rationale, they are really no worse than proof problems in other types of cases.

Professor Imwinkelried has addressed this issue as part of his equal protection analysis, indicating that many other crimes could claim at least as great a necessity for using criminal character evidence.[497] At least with sex offenses, the victim is usually able to testify. Murder victims cannot testify at all, and theft victims are usually unable to identify the thief. Sex offenses allow the use of expert testimony[498] and potential trace evidence to help corroborate the victims' testimony, giving the prosecutor "a wide array of evidentiary tools" that are not available for many other types of offenses.[499] A quick re-examination of the Rule 404(b) case law in this area further demonstrates the new rules are unnecessary. Even if the courts

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acquitted, presumably finding that the accused's belief that the victim had consented was at least reasonable. The testimony of the alleged victim in this case would be admissible in a later sexual assault prosecution under Rule 413. See FED. R. EVID. 413; 18 U.S.C. §§ 2241(b)(2), 2242(2) (1994); 10 U.S.C. § 920 (1994); MCM, supra note 131, pt. IV, ¶ 45c(1).

[494] *See* A. Nicholas Groth et al., Rape: Power, Anger, and Sexuality, 134 AM. J. PSYCHIATRY 1239, 1240 (1977) ("One of the most basic observations one can make about rapists is that they are not all alike. . . . Our clinical experience has shown . . . that in all cases of forcible rape three components are present: power, anger, and sexuality. . . . We have found that either power or anger dominates and that rape, rather than being primarily an expression of sexual desire, is, in fact, the use of sexuality to express issues of power and anger.").

[495] Karp, supra note 357, at 20-21.

[496] *Id.* at 21.

[497] Imwinkelried, supra note 450, at 299-300.

[498] For example, this testimony could help in explaining that inconsistencies in the victim's testimony are consistent with Rape Trauma Syndrome or Child Sexual Abuse Accommodation Syndrome. See, *e.g.*, United States v. Houser, 36 M.J. 392 (C.M.A.), cert. denied, 114 S. Ct. 182 (1993); United States v. Suarez, 35 M.J. 374 (C.M.A. 1992).

[499] Imwinkelried, supra note 450, at 299-300.

reject my broadened approach to Rule 404(b) admissibility,[500] ample federal precedent exists to admit uncharged sex offense and child molestation evidence under various accepted Rule 404(b) noncharacter rationales.[501] At least in the military, necessity is not a valid reason to implement Rules 413 and 414.

So why has Congress given us these new rules? Because the pendulum has swung in that direction. Popular sentiment has long been growing that the courts let too many criminals off on technicalities, while they further brutalize the victims. These new evidence rules are a manifestation of these sentiments. Interestingly, these rules pulled two diverse political groups together: the "law and order" group and the "women's rights" group. The intent of the rules is to try to increase the likelihood of convicting a guilty sex offender, while providing greater protection and support to the victims who are predominantly women and children. What can possibly be wrong with this? Nothing. The problems come from the unintended effects of the new rules.

Because the new rules allow a wide range of evidence that could easily be unfairly prejudicial to the accused, they rely on Rule 403 for their constitutionality. But Rule 403 shifts the burden of proof to the defense.[502] Instead of the prosecutor having to justify the legitimacy of the evidence, the defense will have to show that its unfair prejudice potential substantially outweighs its probative value.[503] In a very real sense, this undermines the presumption of innocence. Even if the Supreme Court finds the new rules constitutional, the analysis should not end there. Are they rules that conform with our national ideals of fairness? When you compare Rules 413 and 414 with Rule 412, is the disparate treatment of character evidence disconcerting? Has the pendulum swung too far in one direction?

The objectives of the new rules are laudable. But in our zealous pursuit of criminals we always must remember that diminishing the rights of the guilty diminishes the rights of all. Of course we should

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[500] *See supra* text accompanying notes 387-98.

[501] *See supra* text accompanying notes 387-90.

[502] *See* SALTZBURG ET AL., *supra* note 129, at 435 ("The use **of** the word 'substantially' in the Rule suggests that in close cases the drafters intended that evidence should be admitted rather than excluded. . . . The Rule requires the trial judge to be confident that the evidence will do more harm than good before excluding it and removing it entirely from the case.").

[503] *See* FED. R. EVID. 403; MCM, *supra* note 131, MIL. R. EVID. 403. ***See also*** Karp, *supra* note 357, at 19 & n.29 (quoting the unpublished analysis statement to the new rules as indicating "it is not expected . . . that evidence admissible pursuant to proposed Rules 413-15 would often be excluded on the basis of Rule 403").

support and assist the victims throughout the ordeal that a criminal trial puts them through. But more often than not, failure to care for the victims is not the fault of evidence rules, it is the fault of people. Congress has taken other productive steps to try to improve the way our system treats victims.[504] But in a criminal trial our national public policy must not lose sight of the fact that the accused is the one on trial. The accused is the one presumed innocent and afforded due process rights to ensure the government does not unjustly convict him or her. If we allow unequal and unfair treatment of a certain class of accused because of moral outrage over their alleged crimes, then we are likely to find ourselves with less rights as well.

E. Recommendations

Because these new rules are unnecessary, arguably unconstitutional, and alarmingly inquisitorial, I recommend that the President exercise his executive authority to remove them from the Military Rules of Evidence.[505] Rule 404(b), as currently interpreted, is more than sufficient to meet the policy objectives behind the new rules, and it does so without opening the flood gates to as wide an assortment of the accused's personal history. Rule 404(b) places the burden on the government to show the relevance of uncharged misconduct, instead of on the accused to show irrelevance.[506] This is the proper allocation of burdens in an accusatory system such as ours.

Presidential repeal of incorporated rules is not without precedent in the short history of the Military Rules of Evidence. A similar situation occurred in 1984 when Congress enacted Federal Rule of Evidence 704(b) as part of the Insanity Defense Reform Act.[507] Often

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[504] *See, e.g.*, Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-1515 (1994)); Victims of Crime Act of 1984, Pub. L. No. 98-473, tit. 11, ch. XIV, 98 Stat. 2170 (codified as amended at 18 U.S.C. §§ 3013, 3663-3664 (1994); 42 U.S.C. §§ 10601-10605 (1988 & Supp. V 1993)); Victims' Rights and Restitution Act of 1990, Pub. L. No. 101-647, tit. V, 104 Stat. 4820 (codified as amended at 42 U.S.C. §§ 10606-10607 (Supp. V 1993)). Congress has continued to provide additional assistance to crime victims through measures in the annual National Defense Authorization Act as well. *See, e.g.*, National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, §§ 534-535, 108 Stat. 2663, 2761-63 (1994) (requiring consolidation of victims' advocates programs in the Department of Defense and providing transitional compensation and other benefits for dependents of members separated for dependent abuse).

[505] Federal Rules of Evidence 413 to 415 were incorporated verbatim into the Military Rules of Evidence as of January 6, 1996, but Proposed Military Rules of Evidence to take their place are currently pending. *See supra* text accompanying notes 380-86.

[506] *See supra* text accompanying notes 400-12, 502-03.

[507] Pub. L. No. 98-473, tit. 11, ch. IV, 98 Stat. 2058, 2067-68 (1984). *See* MCM, *supra* note 131, MIL. R. EVID. 704 analysis, app. 22 (1986 amendments); SALTZBURG ET AL., *supra* note 129, at 744-45.

referred to as the "Hinckley exception" after President Reagan's attempted assassin,[508] Rule 704(b) prevents expert witnesses from stating an opinion on whether or not the accused had a mental state or condition constituting an element of an offense or defense.[509] While this rule became a part of the Military Rules of Evidence by automatic incorporation in April of 1985, it was never published in the *Manual for Courts-Martial*.[510] In February of 1986, the President rescinded the new rule and restored the original version of the rule.[511] The reason for the President's action was that the change was considered to be unnecessary in the military setting.[512]

A similar presidential repeal would be appropriate in the case of new Rules 413 and 414. Not only are they unnecessary in the military setting, they are far more likely to be applied in a military court-martial than in a federal trial, because of the higher volume of sex offenses tried in the military.[513] This presents a far greater danger for misapplication and for all of the other dangers associated with these new rules. Based on my experiences and discussions with military members, they also are far more likely than the average civilian to punish an accused for past misconduct, thus, it is all the more important to ensure that this evidence does not reach them unless for a proper purpose.

If the President is concerned that some courts may be interpreting Rule 404(b) too restrictively, then the better remedy would

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[508] On March 30, 1981, John W. Hinckley, Jr., the son of a wealthy oil executive, attempted to assassinate President Reagan, firing at him with a revolver outside the Washington Hilton Hotel. David S. Broder, ***Reugan Wounded by Assailant's Bullet,*** WASH. POST, Mar. 31, 1981, at A1. At trial, Hinckley relied on the insanity defense, and thanks to his family's financial position, was able to present extensive psychiatric expert testimony. On June 21,1982, he was found not guilty by reason of insanity. Rita R. Carroll, ***Insanity Defense Reform,*** 114 MIL. L. REV. 183, 184 (1986). This outcome outraged many, including many in Congress, and became one of the key catalysts in the move to reform the insanity defense. *Id.* at 184-85.

[509] FED. R. EVID. 704(b).

[510] MCM, ***supra*** note 131, MIL. R. EVID. 704 analysis, app. 22 (Feb. 1986 amendment).

[511] SALTZBURG ET AL., ***supra*** note 129, at 745.

[512] *See* MCM, ***supra*** note 131, MIL. R. EVID. 704 analysis, app. 22 (1986 amendment). The analysis states, The statutory qualifications for military court members reduce the risk that military court members will be unduly influenced by the presentation of ultimate opinion testimony from psychiatric experts." *Id.* Some might argue that an analogous argument actually supports the new rules and their broadened admissibility of evidence. On the contrary, military members, most of whom are more senior and have strong family values, probably are more likely than the general population to become outraged and lose their impartiality when confronted with past sexual offenses of an accused, particularly offenses against children.

[513] *See* 1 SALTZBURG ET AL., ***supra*** note 387, at 577 (noting that "relatively few sex crime cases [are] tried in the federal courts."); Duane, ***supra*** note 404, at 114 (noting, "Rape is not usually a federal offense.").

be to amend that rule. Based on my argument that "character" should be defined narrowly in the rules, the following amended version of Rule 404(b) would clarify that specific propensities may be proven:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible ***solely*** to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, ~~or~~ absence of mistake or accident, ***or any other relevant and specific propensity of the person,*** provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.[514]

In this amendment, the word "solely" clarifies that Rule 404(b) only prohibits uncharged misconduct evidence offered for no other purpose than to prove character. The additional language listing "relevant and specific propensity" as an allowable noncharacter purpose for using uncharged misconduct evidence communicates to judges that "character" is a general term referring to a person's good or bad moral qualities and not to his or her tendencies and habits.[515] Essentially, this places "propensity" into a middle category between general character on the one end and ingrained habit on the other.[516] If this needs further clarification, Rule 404(c) could be added as follows:

> (c) Definitions. "Character" means the general good or bad moral qualities of a person. "Propensity" means the specif-

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[514] *See* MCM, *supra* note 131, MIL. R. EVID. 404(b). In all of these proposed amendments, the **original** language I would delete is lined through and the additional language I would insert is italicized.

[515] The first definition of "character" in ***Black's Law Dictionary*** reads: "The aggregate of the moral qualities which belong to and distinguish an individual person; the general result of the [sic] one's distinguishing attributes." **BLACK'S LAW DICTIONARY** 232 (6th ed. 1990).

[516] Habit evidence already is admissible under Rule **406,** but frequent repetition must generally be shown to prove habit. MCM, ***supra*** note 131, MIL. R. EVID. 406; SALTZBURG ET AL., ***supra*** note 129, at 502-03. *See also* Rothstein, ***supra*** note 389, at 1265. One commentator has proposed amending Rule 406 to allow sexual "compulsion" evidence, instead of adding Rules 413 to 415. ***See*** James S. Liebman, ***Violent Crime Control and Law Enforcement Act of 1994: Proposed Evidence Rules 413 to 415—Some Problems and Recommendations, 20*** **DAYTON** L. REV. 753,759,761 (1995).

> ic tendency of a person to act in a certain way in a specific set of circumstances.[517]

The advantage of this amendment allowing any propensity, as opposed to one allowing only propensity to commit sex offenses, is that it avoids most of the disparate treatment inherent in Rules 413 and 414, and the potential equal protection challenges that would come with it. Not only are all offenses treated equally under the rule, but the parties also are treated equally because Rule 404(b) is available to both the government and the defense.[518] If the President considers this amendment too radical under the circumstances, however, a more limited version could be substituted.[519]

A further alternative to outright repeal or amending Rule 404(b) would be to amend Rules 413 and 414 to anticipate and correct some of the problems likely to be caused by their ambiguity and inherent conflicts with other rules.[520] An amended version of Rule 413(a) might read as follows:

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[517]The United States Court of Appeals for the Armed Forces has recently defined "character" as (1)a pattern of repetitive behavior that is (2) morally praise worthy or condemnable. United States v. Gagan, 43 M.J. 200, 202 (1995).This definition stresses that character is essentially a moral concept. My definition goes further, distinguishing "character" from "propensity" according to the level of specific similarity of the pattern of behavior to the charged offense. While a person's propensity to molest children would almost certainly reflect poorly on his or her general character as well, under my proposed rule, evidence of that propensity would nevertheless be admissible, but only when the specific propensity itself is relevant. This approach is similar to that of the English courts, which have recently focused more on the probative value of the evidence and less on the "character" label attached to the evidence. *See* Edward J. Imwinkelried, *The Use of an Accused's Uncharged Misconduct to Prove* Mens Rea: *The Doctrines that Threaten to Engulf the Character Evidence Prohibition,* 130 MIL. *L.* REV. 41, 74 & n.185 (1990).

[518]Some of the disparate treatment of victims under Rule 412 would remain, but this is a relatively weak equal protection challenge, especially in light of the continued inadmissibility of "pure" character evidence under this amendment. *See supra* text accompanying notes 458-77.

[519]For example:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible *solely* to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, ~~or~~ absence of mistake *or* accident, *or propensity to commit sex offenses,*provided that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, **or** during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

[520]*See supra* text accompanying notes 399-425. The amendments to Rules 404 and 405 proposed in the Judicial Conference Report are another alternative for clarifying and implementing the congressional intent behind Rules 413 to 415, but they are more difficult to comprehend as a whole and appear to go beyond what Congress intended to permit. JUD. CONF. REP., *supra* note 367, *reprinted in 56* Crim. *L.* Rep. (BNA) 2139, at 2140-41. *See supra* text accompanying notes 367-77. The amendments to Rules 404 and 405 proposed in the Judicial Conference Report are another alternative for clarifying and implementing the congressional intent behind Rules 413 to 415,

> (a) *Notwithstanding Mil. R. Evid. 404 and 405, but subject to the other provisions of these rules, in* In a court-martial in which the accused is charged with an offense of sexual assault, *specific acts* evidence of the accused's commission of another *similar* offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. *If the prosecution offers specific acts evidence under this rule, the accused may offer specific acts evidence in rebuttal.*[521]

This amendment clarifies that the new rules still are subject to all other rules except for Rules **404** and **405,** with which they necessarily conflict under the conventional definition of character evidence. It also explicitly limits proof of prior offenses to specific acts evidence to avoid potential offers of reputation or opinion evidence that the accused is a "pervert," a "child molester," or words to that effect. The word "similar," while still subject to interpretation and judicial discretion, adds a greater requirement of similarity between the charged and uncharged offenses to ensure that the uncharged offenses are at least somewhat probative of a propensity to commit the charged act. Finally, the second sentence adds a reciprocity absent in the current rules by allowing the accused to rebut specific acts evidence in kind.

Beyond the question of whether or not to implement these new rules, other improvements in the way that we prosecute sex offenders and child molesters can accomplish many of the same worthwhile goals. As Professor Imwinkelried points out, sex offenses lend themselves to the use of some very valuable evidentiary tools, such as expert testimony and forensic evidence.[522] If a need exists to do a better job prosecuting these cases in the military, the best way to meet that need is by improving the prosecutor's access to these kinds of evidentiary resources, rather than relying on a more inquisitorial trial process. Tempting though it may be to blame an

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but they are more difficult to comprehend as a whole and appear to go beyond what Congress intended to permit. JUD. CONF. REP., *supra* note *367, reprinted in 56* Crim. L. Rep. (BNA) *2139,* at *2140-41. See supra* text accompanying notes *367-77.*

[521] The analogous amendment to Rule 414(a) would read as follows:

> (a) *Notwithstanding Mil.* R. *Evid. 404 and 405, but subject to the other provisions of these rules, in* In a court-martial in which the accused is charged with an offense of child molestation, *specific acts* evidence of the accused's commission of another *similar* offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant. *If the prosecution offers specific acts evidence under this rule, the accused may offer specific acts evidence in rebuttal.*

[522] *See supra* text accompanying notes 497-99.

injustice on the "unreasonably protective" criminal justice system, we need to take a hard look at whether or not we really did everything allowed by that system to legally obtain the just result in the case. Our system and our fundamental ideals demand that we prove the accused's guilt, not presume it.

In the final analysis, just results depend on qualified judges exercising sound discretion. We will not agree with every decision or result, but our system is based on guaranteeing individual justice on a case-by-case basis, not predeciding cases in the legislature. Rules 404(b) and 403 allow judges to exercise discretion in admitting uncharged misconduct evidence. This is the best guarantee of a fair trial. The judge can decide each case on its merits. No rule can ever foresee all cases, even when it is thoroughly researched, developed, drafted, and debated. In the case of Rules 413 and 414, the lack of thorough consideration in the rule-making process makes it all the more imperative that these rules not remain part of the Military Rules of Evidence in their current form.

VIII. Conclusion

The general uncharged misconduct prohibition originated as a way to improve the fairness of trials by giving the accused fair notice of the charges to be tried and limiting the trial to only those charges. Even then, the courts received uncharged misconduct evidence when it was directly relevant to the charged offenses. As common law courts interpreted this rule, they transformed it into a rule excluding all uncharged misconduct, with very narrow exceptions. Meanwhile, English juries transformed from groups of neighbors who knew the character of the accused to increasingly impartial bodies more capable of fair and unbiased verdicts. Because this impartiality was seen by our Founding Fathers as a fundamental requirement of a fair judicial system, they incorporated it as a matter of right in the Sixth Amendment. As the uncharged misconduct prohibition matured over the years, jurists began to realize that it was being interpreted too restrictively. When Federal Rule of Evidence 404(b) was ultimately codified, it embodied the rule that uncharged misconduct was prohibited only when offered solely to prove the character of the accused. While proving "bad character" would deny the accused the right to an impartial jury, uncharged misconduct evidence was allowed for any other relevant purpose. Military Rule of Evidence 404(b) is almost identical to the Federal Rule of Evidence and, therefore, is subject to the same interpretations.

New Federal Rules of Evidence 413 and 414, enacted by Congress in 1994 to address a perceived difficulty in prosecuting sex offenders and child molesters, supersede Rule 404(b) in the cases in which they apply. But these rules are unnecessary, arguably unconstitutional, and laden with ambiguity and conflicts. Rule 404(b) is more than adequate to admit the kind of evidence that the new rules seek to admit. Therefore, the President should exercise his executive authority to prevent Rules 413 and 414 from remaining as part of the Military Rules of Evidence in their current form.

APPENDIX A

FEDERAL RULES OF EVIDENCE 413-415

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

(d) For purposes of this Rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of Title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of Title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the government intends to offer evidence under this Rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

(d) For purposes of this Rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of Title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of Title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of Title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that

party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule **413** and Rule **414** of these Rules.

(b) **A** party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other Rule.

APPENDIX B

PROPOSED MILITARY RULES OF EVIDENCE 413-414

(With Proposed Analysis)

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least five days before the scheduled date of trial or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, offense of sexual assault means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved—

(1) Any sexual act or sexual contact, without consent, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) Contact, without consent, between any part of the accused's body or an object and the genitals or anus of another person;

(3) Contact, without consent, between the genitals or anus of the accused and any part of another person's body;

(4) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) An attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

(e) For purposes of this rule, the term sexual act means:

(1) Contact between the penis and the vulva or the penis and the anus, and for purposes of this rule contact involving the penis occurs upon penetration, however slight;

(2) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus:

(3) The penetration, however slight, of the anal or genital opening of another by hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of sixteen years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purposes of this rule, the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

(a) In a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a court-martial in which the Government intends to offer evidence under this rule, the Government shall disclose the evidence to the accused, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least five days before the scheduled date of trial or at such later time as the military judge may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule, child means a person below the

age of sixteen, and offense of child molestation means an offense punishable under the Uniform Code of Military Justice, or a crime under Federal law or the law of a State that involved—

(1) Any sexual act or sexual contact with a child, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(2) Any sexually explicit conduct with children, proscribed by the Uniform Code of Military Justice, Federal law, or the law of a State;

(3) Contact between any part of the accused's body or an object and the genitals or anus of a child;

(4) Contact between the genitals or anus of the accused and any part of the body of a child;

(5) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) An attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

(e) For purposes of this rule, the term sexual act means:

(1) Contact between the penis and the vulva or the penis and the anus, and for purposes of this rule contact involving the penis occurs upon penetration, however slight;

(2) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(3) The penetration, however slight, of the anal or genital opening of another by hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(4) The intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of sixteen years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(f) For purposes of this rule, the term sexual contact means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(g) For purpose of this rule, the term "sexually explicit conduct[n]

means actual or simulated:

(1) Sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between persons of the same or opposite sex;

(2) Bestiality;

(3) Masturbation;

(4) Sadistic or masochistic abuse; or

(5) Lascivious exhibition of the genitals or pubic area of any person.

(h) For purposes of this rule, the term "State" includes a State of the United States, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and any other territory or possession of the United States.

The proposed analysis for the Rules (Appendix 22, M.R.E.) is as follows:

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

1996 Amendment. This amendment is intended to provide for more liberal admissibility of character evidence in criminal cases of sexual assault where the accused has committed a prior act of sexual assault.

Rule 413 is nearly identical to its Federal Rule counterpart. A number of changes were made, however, to tailor the Rule to military practice. First, all references to Federal Rule 415 were deleted, as it applies only to civil proceedings. Second, military justice terminology was substituted where appropriate (e.g., accused for defendant, court-martial for case). Third, the five-day notice requirement in Rule 413(b) replaced a fifteen-day notice requirement in the Federal Rule. A five-day requirement is better suited to military discovery practice. Fourth, Rule 413(d) has been modified to include violations of the Uniform Code of Military Justice. Also, the phrase "without consent" was added to Rule 413(d)(1) to specifically exclude the introduction of evidence concerning adultery or consensual sodomy. Last, all incorporation by way of reference was removed by adding subsections (e), (f), and (g). The definitions in those subsections were taken directly from Title 18, United States Code §§ 2246(2), 2246(3), and 513(c)(5), respectively.

Although the Rule states that the evidence "is admissible," the drafters' intend that the courts apply Rule 403 balancing to such evidence. Apparently, this also was the intent of Congress. The legislative history reveals that "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under Evidence Rule 403 to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 156 F.R.D. 51 (1995) (reprint of the Floor Statement of the Principal House Sponsor, Representative Susan Molinari, Concerning the Prior Crimes Evidence Rules for Sexual Assault and Child Molestation Cases).

When "weighing the probative value of such evidence, the court may, as part of its Rule 403 determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicate misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences." 156 F.R.D. 51, 55 (1995) (Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

1996 Amendment. This amendment is intended to provide for more liberal admissibility of character evidence in criminal cases of child molestation where the accused has committed a prior act of sexual assault or child molestation.

Rule 414 is nearly identical to its Federal Rule counterpart. A number of changes were made, however, to tailor the Rule to military practice. First, all references to Federal Rule 415 were deleted, as it applies only to civil proceedings. Second, military justice terminology was substituted where appropriate (e.g., accused for defendant, court-martial for case). Third, the five-day notice requirement in Rule 414(b) replaced a fifteen-day notice requirement in the Federal rule. A five-day requirement is better suited to military discovery practice. Fourth, Rule 414(d) has been modified to include violations of the Uniform Code of Military Justice. Last, all incorporation by way of reference was removed by adding subsections (e)(f), (g), and (h). The definitions in those subsections were taken directly from Title 18, United States Code §§ 2246(2), 2246(3), 2256(2), and 513(c)(5), respectively.

Although the Rule states that the evidence "is admissible," the drafters' intend that the courts apply Rule 403 balancing to such evi-

dence. Apparently, this was also the intent of Congress. The legislative history reveals that "the general standards of the rules of evidence will continue to apply, including the restrictions on hearsay evidence and the court's authority under Evidence Rule **403** to exclude evidence whose probative value is substantially outweighed by its prejudicial effect." 156 F.R.D. 51 (1995) (reprint of the Floor Statement of the Principal House Sponsor, Representative Susan Molinari, Concerning the Prior Crime Evidence Rules for Sexual Assault and Child Molestation Cases).

When "weighing the probative value of such evidence, the court may, as part of its Rule **403** determination, consider proximity in time to the charged or predicate misconduct; similarity to the charged or predicated misconduct; frequency of the other acts; surrounding circumstances; relevant intervening events; and other relevant similarities or differences." 156 F.R.D. 51, **55** (1955) (Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases.).

THE MILITARY'S DRUNK DRMNG STATUTE: HAVE WE GONE TOO FAR,?

MAJOR R. PETER MASTERTON*

I. Introduction

One Friday afternoon, Captain John Doe, an officer stationed in Germany, joins his friends at the Officer's Club after work. He quickly drinks two beers and prepares to drive home. He is confident that he is not too intoxicated to drive. He does not feel drunk and remembers reading a chart which indicated that two drinks would give him a blood alcohol level well below the legal limit.[1] Just to

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[1] In State v. Tanner, 472 N.E.2d 689,692 (Ohio 1984), the court noted that such charta are readily available to the public. The following chart was reproduced in the ***Tanner*** opinion:

NUMBER OF DRINKS TO REACH APPROXIMATE BLOOD ALCOHOL CONTENT (BAC)

DRINKS		BODY WEIGHT IN POUNDS								
		100	120	140	160	180	200	220	240	
One drink	1	.04	.03	.03	.02	.02	.02	.02	.02	REASONABLE
= 1oz of	2	.08	.06	.05	.05	1.04	.04	.03	.03	
180 proof	3	.11	09	.08	.07	.06	.06	.05	.05	
liquor,	4	.15	.12	.11	.09	.08	.08	.07	.06	
4 oz. of	5	.19	.16	.13	.12	.11	.09	.09	.08	UNSAFE
table	6	.23	.19	.16	.14	.13	.11	.10	.09	
wine or	7	.26	.22	.19	.17	.15	.13	.12	.11	
12 oz	8	.30	.25	.21	.19	.17	.15	.14	.13	ILLEGAL
of beer	9	.34	.28	.24	.21	.19	.17	.15	.14	
	10	.38	.31	.27	.23	.21	.19	.17	.16	

make sure, Captain Doe uses a breath-alcohol tester located in the club; he passes.[2]

Captain Doe gets into his car and begins to drive home. On the way, he is pulled over at a sobriety checkpoint conducted by the military police.[3] Much to his surprise, Captain Doe's breath alcohol reading is just over the legal limit of .10.[4] Captain Doe is apprehended and, several weeks later, receives nonjudicial punishment[5] for drunk driving, in violation of Article 111 of the Uniform Code of Military Justice (UCMJ).[6] This incident will probably terminate Captain Doe's military career.[7] However, the breath alcohol test which led to his nonjudicial punishment may have overestimated his blood alcohol concentration and degree of intoxication by as much as 100%.[8]

Article 111 makes it a crime to operate a vehicle with a breath alcohol concentration of .10 grams or more per 210 liters of breath.[9] Recently, scientists and legal scholars have questioned the propriety of such drunk driving statutes which contain per se prohibitions based on a breath alcohol concentration.[10] A person's breath alcohol

[2]Army clubs used to be required to provide alcohol breathalyzers as a service to patrons. DEP'T OF ARMY, REG. 215-2, THE MANAGEMENT AND OPERATION OF ARMY MORALE, WELFARE, AND RECREATION PROGRAMS AND NONAPPROPRIATED FUND INSTRUMENTALITIES, para. **4-16e** (10 Sept. 1990). This requirement has since been rescinded. ***See*** DEP'T OF *ARMY* REG. 215-1, NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES, para. 7-14 (29 Sept. 1995).

[3]The Supreme Court upheld the constitutionality of such sobriety checkpoints in Michigan v. Sitz, 496 U.S. 444 (1990).

*The military drunk driving statute contains a proscription based on an alcohol concentration of .10 grams per 100 milliliters of blood or .10 grams per 210 liters of breath. UCMJ art. 111 (Supp. V 1993).

[5]Nonjudicial punishment allows a commander to impose limited punishment for minor offenses. UCMJ art. 15 (1988); ***see infra*** notes 145-49 and accompanying text. Although Captain Doe's commander is not required to impose nonjudicial punishment in this situation, it is likely that he will. ***See infra*** notes 141-142 and accompanying text.

[6]UCMJ art. 111 (Supp. V 1993).

[7]This incident is likely to terminate Captain Doe's career because the record of nonjudicial punishment may be filed in Captain Doe's permanent military record. Additionally, Captain Doe must receive a reprimand from a general officer as a result of his nonjudicial punishment, which also may be filed in his permanent record. ***See infra*** notes 150-52 and accompanying text.

[8]***See infra*** notes 75-77 and accompanying text.

[9]*Id.* Article 111 also prohibits operating or physically controlling a vehicle with a blood alcohol concentration of .10 grams or more per 100 milliliters of blood. For simplicity, this article will refer to both a breath alcohol concentration of .10 grams per 210 liters of breath and a blood alcohol concentration of .10 grams per 100 milliliters of blood as ".10." However, as this article points out, there may be a significant difference between a ".10" breath alcohol concentration and a ".10" blood alcohol concentration.

[10]*See* Paul Shop, *Is DWI* ***DOA?:Admissibility of Breath Testing Evidence in the Wake of Recent Challenges to Breath Testing Devices, 20*** SW. U. L. REV. 247 (1991); Dominick A. Labianca, ***The Chemical Basis of the Breathalyzer,*** 67 J. CHEMICAL EDUC. 259 (1990).

concentration may not accurately reflect his or her blood alcohol concentration, brain alcohol concentration, or, more importantly, degree of intoxication or impairment.[11]

Drunk driving statutes are designed to prevent traffic accidents, based on the premise that intoxicated drivers are unable to drive safely.[12] Therefore, these statutes should use tests that accurately measure one's ability to drive. Unfortunately, breath alcohol tests do not always do this.

These problems are exacerbated by per se statutes, like Article 111, which make it a crime to drive with a certain breath alcohol concentration. Even if a breath test produces a result which does not accurately reflect a person's degree of intoxication, this issue may not be litigated, because the only relevant issue is whether the person exceeded the statutory breath alcohol concentration.[13]

This article will discuss the propriety of the military's per se proscription based on a .10 breath alcohol concentration. It will examine the scientific[14] and legal problems with Article 111 and will recommend elimination of its per se prohibition based on breath alcohol concentration.

II. History of the Military's Drunk Driving Statute

The military's prohibition on drunk driving originated with the 96th Article of War, the general article that proscribed disorders and neglects to the prejudice of good order and military discipline.[15] The 1949 *Manual for Courts-Martial* contained a model specification under Article 96 which prohibited wrongfully and unlawfully operating a motor vehicle on a public street while drunk or under the influence of liquor or drugs.[16]

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[11] In this article the term "intoxication" will be used to refer to impairment of mental and physical faculties.

[12] 18 U.S.C. § 408 (1988), which required states to establish a .10 blood alcohol concentration as a threshold for driving while intoxicated to receive funding for alcohol traffic safety programs, was designed to "reduce traffic safety problems resulting from persons driving while under the influence of alcohol." Id. The legislative history of this statute pointed out that "[o]ver 25,000 people die in this country each year in traffic accidents related to the consumption of alcohol." H.R. No. 867, 97th Cong. 2d Sess. 7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3367.

[13] *See, e.g.*, State v. Horning, 511 N.W.2d 27 (Minn. App. 1994) (evidence of accused's lack of impairment was properly excluded as irrelevant in prosecution under per se drunk driving statute).

[14] The author would like to express his appreciation to his father, Dr. William L. Masterton, a retired chemistry professor at the University of Connecticut, who provided most of the scientific articles cited in this article.

[15] MANUAL FOR COURTS-MARTIAL, United States, ch. XXIX, para. 183, at 255 (1949).

[16] *Id.* app. 4, para. 142, at 329.

The prohibition on drunk driving was carried forward into the UCMJ when it was enacted in 1950. It was codified in Article 111, which specifically prohibited operation of a vehicle while drunk.[17] The term "drunk" was defined as any intoxication sufficient to sensibly impair the rational and full exercise of the mental or physical faculties.[18] In 1986, Article 111 was expanded to prohibit operation of a vehicle while impaired by a controlled substance.[19]

In 1992, Article 111 was substantially revised. Per se prohibitions based on blood and breath alcohol concentrations were added. Additionally, Article 111 was expanded to include operation of aircraft and vessels. It also was expanded to prohibit physically controlling, as well as operating, a vehicle, aircraft, or vessel.[20] These amendments to Article 111 were designed to bring the military's criminal justice system more closely in line with civilian criminal law.[21]

In 1993, Article 111 was again amended to correct a technical deficiency.[22] The 1992 amendment prohibited operation of a vehicle, aircraft, or vessel with a concentration of .10 grams per 100 milliliters of blood or .10 grams per 210 liters of breath.[23] The 1993 amendment made it clear that operating a vehicle, aircraft, or vessel with a blood or breath alcohol concentration *above* these levels was also prohibited.[24]

III. Comparison with Civilian Statutes

Recently, civilian jurisdictions have reacted to the problem of

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[17]UCMJ art. 111 (1950).

[18]MANUAL FOR COURTS-MARTIAL, United States, para. 35(c)(3) (1984) [hereinafter MCM].

[19]UCMJ art. 111 (1988).

[20]UCMJ art. 111 (Supp. IV 1992).

[21]H. CONF. REP. No. 102-966, 102d Cong., 2d Sess. (1992), ***reprinted in*** 1992 U.S.C.C.A.N. 1769, 1849.

[22]UCMJ art. 111 (Supp. V 1993).

[23]UCMJ art. 111 (Supp. IV 1992).

[24]UCMJ art. 111 (Supp. V 1993). The article currently provides:

> Any person subject to this chapter who-
>
> (1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title (article 112a(b)) [controlled substances], or
>
> (2) operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood or breath is 0.10 grams or more of alcohol per 100 milliliters of blood or 0.10 grams or more of alcohol per 210 liters of breath, as shown by chemical analysis, shall be punished as a court-martial may direct.

drunk drivers with increasingly strict statutes. States have enacted laws limiting the availability of liquor to potential drivers[25] and increasing the penalties for drunk drivers.[26]

The military's drunk driving statute is quite similar to many of these civilian statutes. All state drunk driving statutes contain a reference to a specific blood or breath alcohol concentration. Thirty-six states use a blood alcohol concentration of .10 percent, which is equivalent to the Article 111 standard of .10 grams per 100 milliliters, as the trigger for determining whether a driver has violated the statute.[27] Fourteen states use an even lower blood alcohol concentration as a trigger for determining that a driver violated the statute.[28]

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[25]23 U.S.C. § 158(a)(2) (Supp. II 1990) required states to set a minimum drinking age of 21; if a state failed to comply, a portion of its federal highway funds was withheld.

[26]As of 1 January 1994, 26 states had enacted laws requiring persons convicted of driving while intoxicated for the first time to be sentenced to pay a mandatory fine; 16 states enacted laws requiring those convicted of driving while intoxicated for the first time to be sentenced to serve a mandatory minimum imprisonment sentence. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 150 (1993).

[27]ALA. CODE § 32-5A-191(a)(1) (1994); ALASKA STAT. § 28.35.030(a)(2) (1994); ARIZ REV. STAT. A". § 28-692(B), (N) (1994); ARK. CODE A". § 5-65-103(b) (Michie 1993); COLO. REV. STAT. A". § 42-4-1301(2)(a) (West 1994); DEL. CODE A". tit. 21 § 4177(b) (1994); GA. CODE A". § 40-6-391(a)(4) (1995); HAW. REV. STAT. § 291-4(a)(2) (1994); IDAHO CODE § 18-8004(1)(a) (1995); ILL. REV. STAT. ch. 625, paras. 5/11-501, 501.2 (1995); IND. CODE A". § 9-30-5-1(a) (Burns 1994); IOWA CODE A". § 321J.1.1.b, .2.1.b (West 1995); KY. REV. STAT. A". § 189A.010(1)(a) (Michie/Bobbs- Merrill 1994); LA. REV. STAT. A". § 14:98(A)(2) (West 1995); MICH COMP. LAWS A". § 257.625(1)(b) (West 1995); MINN. STAT. A". §§ 169.01(61), .121(1)(d), .121(1)(e) (West 1995); MISS. CODE A". § 63-11-30(1)(c) (1995); MO. A". STAT. § 577.012(1) Nernon 1995); MONT. CODE ANN. §§ 61-8-406, -407 (1993); NEB. REV. STAT. § 60- 6,196(1)(b), (c) (1993); NEV. REV. STAT. ANN. § 484.379(1)(b), (c) (Michie 1994); N.J. STAT. ANN. § 39:4-50(a) (West 1995); N.Y. VEH. & TRAF. LAW § 1192 (2) (McKinney 1995); N.D. CENT. CODE §§ 39-06.2- 02(2), 39-08-01(1)(a) (1995); OHIO REV. CODE ANN. § 4511.19(A)(2), (3) (Page 1994); OKLA. STAT. A". tit. 47, §§ 11-902(A)(1), 756(5) (West 1995); PA. STAT. A". tit. 75, § 3731(a)(4), (5) (Purdon 1995); R.I. GEN. LAWS § 31-27-2(b)(1) (1994); S.C. CODE ANN. § 56- 5-2950(b)(3) (Law. Co-op 1994); S.D. CODIFIED LAWS ANN. § 32-23- 1(1) (1995); TENN. CODE A". §§ 55-10-401 and 55-10-408(b) (1994); TEX. PENAL CODE ANN. §§ 49.01, .04(a) (West 1995); WASH. REV. CODE A". §§ 46.61.502(1)(a), 506(2) (West 1995); W. VA. CODE § 17C-5- 2(d) (1995); WIS. STAT. ANN. § 346.63(1)(b) (West 1990); WYO. STAT. § 31-5-233(a)(i), (b)(i) (1995). Section 48 of 23 U.S.C. required states to include a reference to a .10 blood alcohol standard in their drunk driving laws to obtain federal highway funds to support alcohol traffic safety programs. *See* 23 U.S.C. § 408(e)(1)(C) (1988)

[28]CAL. VEH. CODE § 23152(b) (West 1995) (.08 percent); CONN. GEN. STAT. ANN. § 14-227a(a) (West 1994) (.07 percent for driving while impaired; .10 percent for driving while intoxicated); FLA STAT. ANN. ch. 316.193(1)(b) (Harrison 1993) (.08 percent); KAN. STAT. ANN. § 8-1567(a)(1) (1994) (.08 percent); ME. REV. STAT. A". tit. 29, § 1312-B(1)(B) (West 1994) (.08 percent); MD. CODE ANN., CTS. & JUD. PROC. § 10-307(e) (1995) (.07 percent); MASS. GEN. LAWS A". ch. 90, § 24(1)(e) (West 1995) (.08 percent); N.H. REV. STAT. A". §§ 259:3-a, 265:82(1)(b) (1994) (.08 percent); N.M. STAT. ANN. §§ 66-8-102(C), -110(E) (Michie 1994) (.08 percent); N.C. GEN. STAT. §§ 20-4.01(0.2), - 138.1(a)(2) (1993) (.08 percent); OR. REV. STAT. § 813.010(1)(a) (1994) (.08 percent); UTAH CODE ANN. § 41-6-44(1)(a)(i), (2) (1995) (.08 percent); VT. STAT. ANN. tit. 23, §§ 1200(1), 1201(a)(1) (1994) (.08 percent); VA. CODE A". § 18.2-266(i) (Michie 1995) (.08 percent).

Forty-six states have enacted per se drunk driving statutes.[29] These statutes, like Article 111, use a particular blood alcohol level to define the offense of drunk driving. Under these statutes, a driver whose blood alcohol level exceeds that proscribed in the statute has committed a crime, even if he or she was not intoxicated.30 Four states have statutes which provide that a particular blood alcohol level is only prima facie evidence of intoxication.[31] Under these statutes, a driver may rebut the prima facie case with evidence that he or she was not intoxicated.[32]

Thirty states have adopted definitions of drunk driving which, like Article 111, rely on a breath alcohol concentration as well as a blood alcohol concentration.[33] Of these states, twenty-nine use the

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[29]ALA. CODE § 32-5A-191(a)(1) (1994); ALASKA STAT. § 28.35.030(a)(2) (1994); ARIZ REV. STAT. ANN. § 28-692(B), (N) (1994); ARK. CODE ANN. § 5-65-103(b) (Michie 1993); CAL. VEH. CODE § 23152(b) (West 1995); COLO. REV. STAT. ANN. § 42-4-1301(2)(a) (West 1994); CONN. GEN. STAT. ANN. § 14-227a(a) (West 1994); DEL. CODE ANN. tit. 21 § 4177(b) (1994); FLA STAT. ANN. ch. 316.193(1)(b) (Harrison 1993); GA. CODE ANN. § 40-6-391(a)(4) (1995); HAW. REV. STAT. § 291-4(a)(2) (1994); IDAHO CODE § 18-8004(1)(a) (1995); ILL. REV. STAT. ch. 625, paras. 5111-501, 501.2 (1995); IND. CODE ANN. § 9-30-5-1(a) (Burns 1994); IOWA CODE ANN. § 321J.1.1.b, .2.1.b (West 19951; KAN. STAT. ANN. § 8-1567(a)(1) (1994); KY. REV. STAT. ANN. § 189A.010(1)(a) (Michie/Bobbs-Merrill 1994); LA. REV. STAT. ANN. § 14:98(A)(2) (West 1995); ME. REV. STAT. ANN. tit. 29, § 1312-B(1)(B) (West 1994); MICH COMP. LAWS ANN. § 257.625(1)(b) (West 1995); MINN. STAT. ANN. §§ 169.01(61), .121(1)(d), .121(1)(e) (West 19951; MISS. CODE ANN. § 63-11-30(1)(c) (1995); MO. ANN. STAT. § 577.012(1) (Vernon 1995); MONT. CODE ANN. §§ 61-8- 406, -407 (1993); NEB. REV. STAT. § 60-6,196(1)(b), (c) (19931; NEV. REV. STAT. ANN. § 484.379(1)(b), (c) (Michie 1994); N.H. REV. STAT. ANN. §§ 259:3-a, 265:82(1)(b) (1994); N.J. STAT. ANN. § 39:4- 50(a) (West 1995); N.M. STAT. ANN. §§ 66-8-102(C), -110(E) (Michie 1994); N.Y. VEH. & TRAF. LAW § 1192 (2) (McKinney 1995); N.C. GEN. STAT. §§ 20-4.01(0.2), -138.1(a)(2) (1993); N.D. CENT. CODE §§ 39- 06.2-02(2), 39-08-01(1)(a) (1995); OHIO REV. CODE ANN. § 4511.19(A)(2), (3) (Page 1994); OKLA. STAT. ANN. tit. 47, §§ 11- 902(A)(1), 756(5) (West 1995); OR. REV. STAT. § 813.010(1)(a) (1994); PA. STAT. ANN. tit. 75, § 3731(a)(4), (5) (Purdon 1995); R.I. GEN. LAWS § 31-27-2(b)(1) (1994); S.D. CODIFIED LAWS ANN. § 32- 23-1(1) (1995); TEX. PENAL CODE ANN. §§ 49.01, .04(a) (West 1995); UTAH CODE ANN. § 41-6-44(1)(a)(i), (2) (1995); VT. STAT. ANN. tit. 23, §§ 1200(1), 1201(a)(1) (1994); VA. CODE ANN. § 18.2-266(i) (Michie 1995); WASH. REV. CODE ANN. §§ 46.61.502(1)(a), 506(2) (West 1995); W. VA. CODE § 17C-5-2(d) (1995); WIS. STAT. ANN. § 346.63(1)(b) (West 1990); WYO. STAT. § 31-5-233(a)(i), (b)(i) (1995).

[30]*See, e.g.*, Smith v. State, 470 So.2d 1365 (Ala. App. 1985) (driver's ability to operate automobile was irrelevant in prosecution under per se drunk driving statute).

[31]MD. CODE ANN., CTS. & JUD. PROC. § 10-307(e) (1995); MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West 1995); S.C. CODE ANN. § 56-5- 2950(b)(3) (Law. Co-op 1994); TENN. CODE ANN. §§ 55-10-401, 55-10- 408(b) (1994).

[32]*See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 10-308(a) (1994) ("evidence of the analysis [of blood or breath] does not limit the introduction of other evidence bearing upon whether the defendant was intoxicated . . . .").

[33]ALASKA STAT. § 28.35.030(a)(2) (1994); ARIZ REV. STAT. ANN. § 28-692(B), (N) (1994); CAL. VEH. CODE § 23152(b) (West 1995); COLO. REV. STAT. ANN. § 42-4-1301(2)(a) (West 1994); FLA STAT. ANN. ch. 316.193(1)(b) (Harrison 1993); HAW. REV. STAT. § 291-4(a)(2) (1994); IDAHO CODE § 18-8004(1)(a) (1995); ILL. REV. STAT. ch. 625, paras. 5111-501, 501.2 (1995); IOWA CODE ANN. § 321J.1.1.b, .2.1.b (West 1995); KAN. STAT. ANN. § 8-1567(a)(1) (1994); KY. REV. STAT. ANN. § 189A.010(1)(a) (Michie/Bobbs-Merrill 1994); MD. CODE ANN., CTS. & JUD. PROC. § 10-307(e) (1995); MICH COMP. LAWS

breath alcohol concentration as a per se standard for intoxication.[34] Twenty states do not include a breath alcohol standard in their drunk driving statutes.[35] Therefore, not all civilian jurisdictions use per se breath alcohol standards like the one contained in Article 111.

IV. Scientific Problems with Breath Alcohol Tests

Although most breath alcohol testing devices give results that appear to be very precise, they may not be an accurate measure of a person's breath alcohol concentration. Interference by other chemicals present in a person's breath, operator error, or errors in the machine, may lead to inaccurate results.[36] Additionally, if the test is conducted long after a suspect was apprehended, the test may not accurately indicate that individual's breath alcohol concentration at the time that he or she was driving.[37]

Even if the device accurately measures a person's breath alcohol concentration, the results may not be meaningful. Because of differences in body temperature, blood composition, rate of alcohol absorption, and lung capacity, a person's breath alcohol concentration may not accurately reflect his or her blood alcohol concentration or brain alcohol concentration.[38] Breath alcohol concentration may overestimate or underestimate blood or brain alcohol concentration

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ANN. § 257.625(1)(b) (West 1995); MINN. STAT. ANN. §§ 169.01(61), .121(1)(d), .121(1)(e) (West 1995); Mo. A". STAT. § 577.012(1) (Vernon 1995); MONT. CODE ANN. §§ 61-8-406, -407 (1993); NEB. REV. STAT. § 60-6,196(1)(b), (c) (1993); N.H. REV. STAT. ANN. §§ 259:3- a, 265:82(1)(b) (1994); N.M. STAT. A". §§ 66-8-102(C), -110(E) (Michie 1994); N.C. GEN. STAT. §§ 20-4.01(0.2), -138.1(a)(2) (1993); N.D. CENT. CODE §§ 39-06.2-02(2), 39-08-01(1)(a) (1995); OHIO REV. CODE ANN. § 4511.19(A)(2), (3) (Page 1994); OKLA. STAT. A". tit. 47, §§ 11-902(A)(1), 756(5) (West 1995); TEX. PENAL CODE A". §§ 49.01, .04(a) (West 1995); UTAH CODE ANN. § 41-6- 44(1)(a)(i), (2) (1995); VT. STAT. ANN. tit. 23, §§ 1200(1), 1201(a)(1) (1994); VA. CODE ANN. § 18.2-266(i) (Michie 1995); WASH. REV. CODE A". §§ 46.61.502(1)(a), 506(2) (West 1995); WIS. STAT. A". § 346.63(1)(b) (West 1990); WYO. STAT. § 31-5-233(a)(i), (b)(i) (1995).

[34] Only Maryland does not use its breath alcohol standard as a per se indication of intoxication. MD. CODE ANN., CTS. & JUD. PROC. § 10-307(e) (1995).

[35] ALA. CODE § 32-5A-191(a)(1) (1994); ARK. CODE ANN. § 5-65- 103(b) (Michie 1993); CONN. GEN. STAT. A". § 14-227a(a) (West 1994); DEL. CODE ANN. tit. 21 § 4177(b) (1994); GA. CODE ANN. § 40- 6-391(a)(4) (1995); IND. CODE ANN. § 9-30-5-1(a) (Burns 1994); LA. REV. STAT. A". § 14:98(A)(2) (West 1995); ME. REV. STAT. A". tit. 29, § 1312-B(1)(B) (West 1994); MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West 1995); MISS. CODE ANN. § 63-11-30(1)(c) (1995); NEV. REV. STAT. ANN. § 484.379(1)(b), (c) (Michie 1994); N.J. STAT. ANN. § 39:4-50(a) (West 1995); N.Y. VEH. & TRAF. LAW § 1192 (2) (McKinney 1995); OR. REV. STAT. § 813.010(1)(a) (1994); PA. STAT. A". tit. 75, § 3731(a)(4), (5) (Purdon 1995); R.I. GEN. LAWS § 31-27-2(b)(1) (1994); S.C. CODE A". § 56-5-2950(b)(3) (Law. co-op 1994); S.D. CODIFIED LAWS A". § 32-23-1(1) (1995); TENN. CODE ANN. §§ 55-10-401 and 55-10-408(b) (1994); W. VA. CODE 8 17C-5-2(d) (1995).

[36] *See infra* notes 49-64 and accompanying text.

[37] *See infra* notes 65-72 and accompanying text.

[38] *See infra* notes 73-97 and accompanying text.

by more than 100%.[39] Furthermore, because everyone's reaction to alcohol is different, blood or brain alcohol concentration may not be an accurate indicator of the person's degree of intoxication.[40] Consequently, breath alcohol tests do not always provide an accurate estimate of a person's ability to drive.

A. *Breath Testing Devices*

Several devices are used in the United States to determine a driver's breath alcohol concentration. Some devices determine breath alcohol content by measuring the result of a "wet" chemical reaction between the alcohol in a suspect's breath and a prepared solution contained inside the machine.[41] The most common wet device was called the "Breathalyzer."[42] Wet devices are no longer widely used.[43]

Most breath alcohol testing devices currently in use rely on "dry" techniques to measure a suspect's breath alcohol concentration.[44] Some, such as the Intoxilyzer, measure the amount of infrared radiation absorbed by the alcohol in a suspect's breath.[45] Some, such as the Alco-Analyzer and G.C. Intoximeter, measure breath alcohol concentrations by gas chromatography.[46] Other "dry" devices, such as the Alco-Limiter and Breathalyzer 2000, determine breath alcohol concentrations by measuring the electrochemical oxidation a suspect's breath causes.[47] A fourth group of "dry" devices, such as the A.L.E.R.T., the Alco-Sensor, and the Roadside Breath Tester, determine breath alcohol concentrations through semiconductor or fuel cell sensing.[48]

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[39] *See infra* notes 75-77 and accompanying text.

[40] *See infra* notes 98-105 and accompanying text.

[41] *See* Shop, *supra* note 10, at 253.

[42] *Id.*; Patrick Harding & Patricia H. Field, *Breathalyzer Accuracy in Actual Law Enforcement Practice: A Comparison of Blood- and Breath-Alcohol Results in Wisconsin Drivers*, 32 J. FORENSIC SCI. 1235 (1987). A newer device, called the Breathalyzer 2000, uses a "dry" technique to measure a suspect's breath alcohol concentration. *See infra* note 47 and accompanying text.

[43] Shop, *supra* note 10, at 253.

[44] *Id.*

[45] M.F. Mason & K.M. Dubowski, *Breath-Alcohol Analysis: Uses, Methods, and Some Forensic Problems—Review and Opinion*, 21 J. FORENSIC SCI. 9, 17 (1976); Patrick M. Harding et al., *Field Performance of the Intoxilyzer 5000: A Comparison of Blood and Breath Alcohol Results in Wisconsin Drivers*, 35 J. FORENSIC SCI. 1022 (1990).

[46] Mason & Dubowski, *supra* note 45, at 15.

[47] *Id.*, at 18; Kurt M. Dubowski & Natalie A. Essary, *Response of Breath-Alcohol Analyzers to Acetone: Further Studies*, 8 J. ANALYTICAL TOXICOLOGY 265 (1984).

[48] Mason & Dubowski, *supra* note 45, at 18.

B. Contamination of Breath Sample

Most of the breath testing devices currently being used cannot discriminate between alcohol and many other organic substances which may be present in a person's breath.[49] These devices may produce a false positive reading for alcohol in response to organic substances other than alcohol which the suspect inhaled prior to the test or which were produced naturally by the suspect's body.

Certain industrial solvents, such as diethyl ether, interfere with breath alcohol testing devices. One study showed that such interference may artificially inflate breath alcohol test results up to three hours after exposure to the solvents.[50] Exposure to toluene, a commonly used solvent for paints and lacquers, has also been shown to increase breath alcohol test results.[51] Additionally, passive inhalation of gasoline fumes can affect breath alcohol test results.[52]

Diabetics, athletes, and individuals who are fasting may release organic substances, such as acetone, into their breath. This also may give a slightly inflated breath alcohol test result.[53]

Ordinarily, chemical interference is not a problem, because these other organic substances are not typically present in a person's breath in any measurable quantity. However, if the person works with certain industrial solvents or has an unusual medical condition, his or her breath alcohol reading may not be accurate.

Fortunately, these inaccuracies can be litigated at trial, even under the military's per se statute. Evidence concerning chemical interference is admissible, because it is relevant to determining the accused's actual breath alcohol concentration.54 However, because

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[49]*Id.* at 14; Dominick A. Labianca, *How Specific for Ethanol Is Breath-Alcohol Analysis Based on Absorption of IR Radiation at 9.5μm?*, 16 J. ANALYTICAL TOXICOLOGY 404 (1992); 2 PAUL C. GIANELLI & EDWARD J. IMWINKELREID, SCIENTIFIC EVIDENCE, § 22-3(B) at 216-17 t2d ed. 1993). Not all breath testing devices have this difficulty. For example, devices which use gas chromatography can distinguish between ethanol and closely related chemicals, such as acetone. However, devices based on infrared radiation techniques cannot distinguish between these chemicals. *Id.*

[50]C.M. Bell et al., *Diethyl Ether Interference with Infrared Breath Analysis*, 16 J. ANALYTICAL TOXICOLOGY 166 (1992).

[51]Labianca, *supra* note 49, at 405.

[52]Stephen Cooper, *Infrared Breath Alcohol Analysis Following Inhalation of Gasoline Fumes*, 5 J. ANALYTICAL TOXICOLOGY 198 (1981).

[53]Dubowski & Essary, *supra* note 47, at 265; A.W. Jones, *Breath-Acetone Concentrations in Fasting Healthy Men: Response of Infrared Breath-Alcohol Analyzers*, 11 J. ANALYTIC TOXICOLOGY 67 (1987).The authors of both of these studies indicated that the interference of acetone was not a significant problem in most cases. *See also* Gianelli & Imwinkelreid, *supra* note 49, § 22-3(b) at 217-18.

[54]MCM, *supra* note 18, MIL. R. EVID. 402.

most of the breath testing devices currently in use have no way of preserving a sample of the suspect's breath,[55] it may be impossible to determine at trial whether the breath alcohol test results were inflated as a result of foreign substances. Although the government carries the burden of disproving chemical interference,[56] this burden may be easily met, because allegations of such interference will, of necessity, be based on speculation.

C. Errors in Test

Errors by the operator of a breath testing device also may cause inaccurate results. For example, if the breath testing device is inaccurately calibrated, the test results will be inaccurate. Calibration of these devices typically consists of conducting a test of air which has been percolated through a sample of a solution containing a known percentage of alcohol. If the solution is improperly prepared, the calibration will be inaccurate.[57]

Additionally, some breath testing devices are subject to interference by radio signals. Because breath testing devices contain sophisticated electronic circuitry, police radios may cause them to produce erratic results.[58] Although a National Bureau of Standards report characterized this interference as "minimal," critics view this interference as a substantial problem.[59]

These inaccuracies can be, and often are, litigated at trial, even under per se statutes like Article 111.[60] However, the inability of most breath testing devices to preserve samples[61] may make it difficult to show that the test results were inflated because of improper calibration or other operator error.

D. Margin of Error in Breath Testing Device

Like any other scientific device, breath testing devices give

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[55]Mason & Dubowski, *supra* note 45, at 14. Some experts argue that stabilizing a breath sample sufficiently to later confirm the original breath analysis is impossible. *See* Gianelli & Imwinkelreid, *supra* note 49, § 22-5 at 229-30. Preservation of breath samples is not constitutionally required. California v. Trombetta, 467 U.S. 479 (1984).

[56]MCM, *supra* note 18, R.C.M. 920(e)(5)(D).

57K.M. Dubowski, *Breath-Alcohol Simulators: Scientific Basis and Actual Performance*, 3 J. ANALYTICAL TOXICOLOGY 177 (1979).

[58]GIANELLI & IMWINKELREID, *supra* note 49, § 22-3(B) at 213-14, 216.

[59]*Id.* § 22-3(B) at 215.

[60]State v. Hurley, 221 S.E.2d 743 (N.C. App. 1976), *cert. denied*, 223 S.E.2d 394 (N.C. 1976) (accused charged with driving while intoxicated was entitled to cross-examine breathalyzer operator to impeach his testimony that he followed proper procedures).

[61]Mason and Dubowski, *supra* note 45, at 14.

results that have a margin of error. Although these margins of error are typically small,[62] they may become important, especially if the breath test result is at or near the legal limit established in the relevant drunk driving statute. This issue can be litigated at trial, even under the military's per se statute.[63] However, some courts are willing to convict an accused even if the margin of error indicates that his or her breath alcohol concentration might have been below the legal limit.[64]

E. Alcohol Concentration at Time Test Versus Time of Apprehension

A problem common to both breath alcohol and blood alcohol tests is that they may not accurately reflect the breath or blood alcohol concentrations at the time that the suspect was driving. Most tests are performed a significant period of time after the suspect is initially apprehended for drunk driving.[65] It is frequently assumed that breath and blood alcohol concentrations will decrease rather than increase over time and that, therefore, breath alcohol tests taken several hours after apprehension will underestimate the suspect's breath or blood alcohol concentration at the time of the offense.[66] However, this is not always the case.[67]

When an individual consumes alcohol, his or her blood alcohol concentration will increase as the alcohol is absorbed into the blood. Eventually the blood alcohol concentration will reach a peak and begin to decrease as the alcohol is eliminated from the system. Several factors affect how quickly this peak concentration is reached, including the amount of food in the person's system and the person's metabolism.68

"Manufacturers commonly specify the precision of their breath testing devices to be "better than" .01 percent blood alcohol concentration, which is equivalent to 10 milligrams per 210 liters of breath. G. Simpson, *Accuracy and Precision of Breath Alcohol Measurements for Subjects in the Absorptive State*, 33 CLINICAL CHEMISTRY 753, 755 (1987)

[63]*See* State v. Bjornsen, 271 N.W.2d 839 (Neb. 1978) (tolerance for error of .005 led to reversal of accused's conviction, where test result was .10 percent and legal limit was also .10 percent).

[64]State v. Keller 672 P.2d 412 (Wash. App. 1983) (accused's conviction was affirmed, based on breath alcohol reading of .10 percent, even though the breathalyzer's margin of error of plus or minus .01 percent indicated that his breath alcohol concentration may have been below the legal limit).

[65]*See, e.g.*, Commonwealth v. Speights, 509 A.2d 1263 (Pa. Super. 1986) (accused's conviction for driving while intoxicated was affirmed even though breathalyzer test was administered 2 hours and 45 minutes after accused's arrest).

[66]David N. Hume & Edward F. Fitzgerald, *Chemical Tests for Intoxication: What Do the Numbers Really Mean?*, 57 ANALYTICAL CHEMISTRY 876,877 (1985).

[67]*See* Simpson, *supra* note 62, at 753; Mason & Dubowski, *supra* note 45, at 28.

[68]Hume & Fitzgerald, *supra* note 66, at 878. Some experts point out that it is possible for an individual's blood alcohol concentration to rise, fall, and then rise again. It also is possible for a person's blood alcohol concentration to reach a peak twice. GIANELLI & IMWINKELREID, *supra* note 49, § 22-4 at 224-26.

Early studies supporting the use of breath and blood alcohol tests indicated that the peak concentration would be reached after approximately thirty minutes.[69] However, more recent studies question the validity of this conclusion.[70] The rate at which the body absorbs alcohol varies significantly from person to person. The peak blood alcohol concentration may not be reached in some persons until up to three hours after the last consumption of alcohol.[71] Consequently, the results of a blood or breath alcohol test taken several hours after the suspect was apprehended may significantly overstate the blood alcohol concentration at the time of apprehension.[72]

F. Ratio of Breath Alcohol to Blood Alcohol

The largest potential inaccuracy in breath alcohol test results is the lack of correlation between breath and blood alcohol levels. The major assumption on which all breath testing devices operate is that 2100 milliliters of breath contains the same amount of alcohol as one milliliter of blood.[73] The assumption is based on Henry's law, a scientific principle which states that, at a given temperature, the concentration of alcohol dissolved in a person's blood will be proportional to the concentration of alcohol in the air in that person's lungs. Based on several studies, the proportion of blood alcohol to breath alcohol at normal body temperature has been set at 1 to 2100 since 1952.[74]

This proportion, known as the "partition ratio," has never been universally accepted.[75] The partition ratio varies from person to person. The upper and lower limits of the partition ratio range between 1 to 1100 and 1 to over 3000. The true partition ratio probably lies somewhere between 1 to 1900 and 1 to 2400.[76] If a person has a partition ratio lower than 1 to 2100, a breath alcohol test will overestimate his or her blood alcohol concentration.[77] For example, if a per-

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[69] *Id.* at **877.**

[70] *See* Simpson, *supra* note **62.**

[71] *See* G. Simpson, *Do Breath Tests Really Underestimate Blood Alcohol Concentration?*, 13 J. ANALYTICAL TOXICOLOGY **120** (1989); GIANELLI & IMWINKELREID, *supra* note 49, § **22-4** at **225.**

[72] Simpson, *supra* note **62.**

[73] Mason & Dubowski, *supra* note 45, at **23.**

[74] Shop, *supra* note 10, at **256.**

[75] Mason & Dubowski, *supra* note **45,** at **23.**

[76] Labianca, *supra* note 10, at **260.** *See also* Mason & Dubowski. *supra* note **45,** at **26-27;** GIANELLI & IMWINKELREID, *supra* note 49, § **22-2**, at 199. These partition ratios were determined by simultaneously measuring breath and blood alcohol concentrations.

[77] Labianca, *supra* note 10, at **260.**

son has a partition ratio of 1 to 1100, a breath test will incorrectly estimate his or her blood alcohol concentration as .10 percent, even though his or her actual blood alcohol concentration is .05. Consequently, a breath alcohol test may overestimate an individual's blood alcohol level by as much as 100%.

1. Temperature — Several factors will affect the partition ratio of a particular individual. The most obvious factor is the person's temperature, because the 1 to 2100 partition ratio is based on the assumption that the person's body temperature is normal.[78] As temperature increases, more alcohol leaves the blood and enters the air in the lungs.[79]

Although the range of possible temperatures in the human body is small, even small differences in temperature can have a marked affect on the partition ratio. An increase of one degree Celsius in body temperature may result in a twenty-three percent increase in the amount of alcohol in one's breath, even though the blood alcohol concentration remains the same.[80] This means that if a person has a fever, a breath alcohol test may significantly overestimate his or her blood alcohol concentration.

2. Hematocrit Factor — Another factor which affects the partition ratio is the amount of water in the blood. The factor typically used to measure this is called the hematocrit, which represents the fraction of whole blood composed of red cells.[81] The higher the hematocrit, the lower the concentration of water in the blood.

Alcohol dissolves almost entirely in the water content of blood. Because a person's breath alcohol concentration is proportional to the concentration of alcohol in the water content of the blood, variations in the hematocrit will cause variations in breath alcohol concentrations, even though the overall blood alcohol concentration remains the same.[82]

The average hematocrit for healthy males is forty-seven percent, with a range of forty to fifty-four percent; the average hematocrit for females is forty-two percent, with a range of thirty-six to forty-seven percent.[83] If a person has a high hematocrit level (low

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[78]The temperature of air in a person's lungs approximates normal body temperature, 37 degrees Celsius (98.6 degrees Fahrenheit). Mason & Dubowski, *supra* note 45, at 24.

[79]*Id.*

[80]Labianca, *supra* note 10, at 260.

[81]*Id.* at 261.

[82]*Id.* *See also* Mason & Dubowski, *supra* note 45, at 25, 28.

[83]Labianca, *supra* note 10, at 261.

concentration of water in the blood), a breath alcohol test will overestimate his or her blood alcohol concentration. *As* a result of variations in the hematocrit levels in blood, a breath alcohol test may overestimate or underestimate blood alcohol concentration by five to seven percent.[84]

3. Absorption Rate—A third factor that can affect the partition ratio is the extent to which the body is absorbing alcohol at the time of the test. If the suspect being tested still has alcohol in his or her stomach and intestines which is being absorbed, the results of a breath alcohol test will often be greater than the result of a blood alcohol test. This occurs because the blood in such a suspect's arteries has a greater concentration of alcohol than the blood in the veins. The suspect's breath alcohol concentration will be proportional to the alcohol-rich arterial blood, which passes through the stomach, intestines, and lungs, rather than the less alcohol-rich blood in the veins, which is sampled during a blood alcohol test.[85]

Breath tests using the 1 to 2100 partition ratio have been shown to overestimate blood alcohol concentration in a person's veins sixteen percent of the time when the tests are conducted during the "postabsorptive" phase, after the peak blood alcohol concentration has been reached.[86] This postabsorptive phase may not be reached until more than three hours after the person has stopped drinking.[87] Therefore, as a result of the absorption of alcohol, breath tests taken *within* three hours of the time a person has stopped drinking will overestimate the blood alcohol concentration *more* than sixteen percent of the time.[88] One analysis concluded that, as a result of absorption of alcohol, breath alcohol tests may overestimate the blood alcohol concentration in a person's veins by more than 100% a significant amount of time after drinking stops.[89]

Arguably, this difference should not matter, because the blood in the suspect's arteries is a more accurate measure of a person's brain alcohol concentration than the blood in a person's veins. However, no studies have been conducted to show the relation of

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[84]*Id.*

[85]*See* Mason & Dubowski, *supra* note 45, at 28.

[86]Simpson, *supra* note 71, at 120. Another expert asserts that breath alcohol tests only overestimate blood alcohol concentration **11.7%** of the time, and only *materially* overestimate blood alcohol concentrations 2.3% of the time. State v. Downie, 569 A.2d 242 (N.J. 1990); GIANELLI & IMWINKELREID, *supra* note 49, § 22-3(B), at 212-13.

[87]*See supra* notes 70-71 and accompanying text.

[88]G. Simpson, *Medicolegal Alcohol Determination: Comparison and Consequences of Breath and Blood Analysis,* 13 J. ANALYTICAL TOXICOLOGY 361, 362 (1989).

[89]Simpson, *supra* note 62, at 753.

arterial blood to the concentration of alcohol in the brain or a person's degree of intoxication.[90]

4. Lung Capacity and Breathing Technique—A fourth factor that can affect the partition ratio is the individual's lung capacity. Breath testing devices are designed to test only "deep lung air," which consists of the air in closest contact with the blood capillaries in the lungs.[91] To do this, a breath testing device typically requires a suspect to blow into the machine for a prolonged period of time. The device tests only the last portion of the sample.[92] As a result, the device will tend to underestimate the breath alcohol concentration of individuals with a greater lung capacity, because it will test less of the alcohol-rich deep lung air. Conversely, breath testing devices will tend to produce higher breath alcohol reading when testing individuals with a small lung capacity.[93] One study showed that the alcohol concentration of the initial portion of a suspect's expired breath will be about twenty percent less than the concentration of the final portion of the breath, composed of deep lung air.[94]

A subject's breathing technique also may have an impact on breath test results. If a subject holds his or her breath before a breath test, the air in the lungs will have more time to absorb alcohol from the blood. One study indicated that breath alcohol concentrations may increase by as much as eighteen percent if a subject holds his or her breath prior to the test.[95] On the other hand, individuals who hyperventilate prior to the breath test may decrease their breath alcohol concentrations by as much as twelve percent.[96]

Arguably, these differences should be irrelevant, because the tests produce more "accurate" results when an individual has a smaller lung capacity or holds his or her breath prior to the test. However, the studies supporting the 1 to 2100 partition ratio involved subjects who had normal lung capacities and used normal breathing techniques.[97] This partition ratio may not be accurate when applied to individuals with small lung capacities or unusual breathing techniques.

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[90]Simpson, *supra* note 88, at **363;** Simpson, *supra* note 62 at **755.**

[91]Mason & Dubowski, *supra* note **45,** at 22.

[92]Labianca, *supra* note **10,** at 260.

[93]Shop, *supra* note 10, at 259.

[94]A.W. Jones, *Quantitative Measurements of the Alcohol Concentration and the Temperature of Breath During Prolonged Exhalation,* **114** ACTA PHSYSIOLOGICA SCANDINAVICA **407** (1982).

[95]A.W. Jones, *How Breathing Technique Can Influence the Results of Breath-Alcohol Analysis* **22 MED .** SCI. & L. 275 (1982).

[96]*Id. See also* Simpson, *supra* note 88, at **364.**

[97]Mason & Dubowski, *supra* note **45,** at 22-23.

G. Relation of Alcohol Concentration to Intoxication

Another problem common to both blood and breath alcohol tests is that neither measure an individual's degree of intoxication with complete accuracy. A person's reaction to alcohol varies a great deal, depending on his or her unique physical characteristics.[98]

In 1938, based on early studies on the effect of alcohol on humans, the National Safety Council and American Medical Association recommended that individuals with blood alcohol concentrations over .15 percent be presumed to be intoxicated.[99] In 1960, based on later studies, the National Safety Council and American Medical Association recommended that this presumption be lowered to .10 percent.[100] This presumption based on .10 percent was incorporated into the Uniform Vehicle Code in 1962. In 1984, the presumption in the Uniform Vehicle Code was lowered to .08 percent.[101] In 1988, the American College of Emergency Physicians recommended that a .05 percent blood alcohol concentration be considered presumptive evidence of intoxication.[102]

Unfortunately, these presumptions are not always accurate. A person with a high blood or breath alcohol concentration may show fewer signs of intoxication than someone with a much lower blood alcohol concentration. One reason for this variance is that neither blood nor breath alcohol concentration is a direct measure of brain alcohol concentration. The brain alcohol content induces the symptoms of intoxication.[103] Although this concentration is related to blood alcohol concentration, this relationship is only approximate.[104]

The major reason for the variance in individual reactions to alcohol is that tolerance for alcohol varies widely from person to person, Although a majority of persons may demonstrate signs of intoxication at .10 percent, a significant number of persons demonstrate few or no symptoms of intoxication at this concentration. In one study of twenty-one patients with histories of alcohol use, no impair-

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[98]*Id.* at 19; GIANELLI & IMWINKELREID, *supra* note 49, § 22-2, at 200.

[99]Mason & Dubowski. *supra* note 45, at 10; GIANELLI & IMWINKELREID, *supra* note 49, § 22-1, at 194.

[100]Shop, *supra* note 10, at 247-9; GIANELLI & IMWINKELREID, *supra* note 49, § 22-1, at 194-95.

[101]*Id.*; UNIFORM VEHICLE CODE AND MODEL TRAFFIC ORDINANCE §11-902,1(b) (Supp.IV 1984).

[102]American College of Emergency Physicians, *Position Statement, Blood Alcohol Concentration and Driving*, 17 ANNALS OF EMERGENCY MEDICINE 1252 (1988).

[103]GIANELLI & IMWINKELREID, *supra* note 49, § 22-3(B), at 205.

[104]The brain alcohol concentration is usually approximately 90% of the blood alcohol Concentration. *Id.* § 22-2 at 200.

ment in motor control was detected in three individuals with blood alcohol concentrations ranging from .108 to .429.[105]

V. Legal Problems with Breath Alcohol Tests

The scientific problems with Article Ill's per se proscription based on breath alcohol concentration raise several legal issues. Because breath alcohol concentration may have little correlation to blood alcohol concentration or level of intoxication, it is extremely difficult to tell when one has exceeded the legal limit of .10 grams per 210 liters of breath. As a result, Article 111 is unfair, because it does not adequately notify individuals when it is illegal to drive.[106] Article 111 also prevents those accused of driving with a breath alcohol concentration in excess of the proscribed limit from proving that they are not intoxicated. This is the equivalent of an unfair irrebuttable presumption that individuals with the proscribed breath alcohol concentration are drunk.[107] Furthermore, Article Ill's per se proscription based on breath alcohol concentration unfairly discriminates against minorities and women. Studies have shown that minorities and women have smaller lung. capacities and, therefore, test higher on breath alcohol tests than others with the same blood alcohol concentrations.[108]

The courts have found that these problems do not make per se drunk driving statues unconstitutional.[109] However, these problems make these statutes unfair. This situation is exacerbated in the military where a drunk driving conviction can have a devastating effect on a service member's career.[110]

A. *Lack of Notice*

Article 111 does not notify accused service members of how much alcohol that they may consume **before** their breath alcohol concentration makes it unlawful for them to drive. Although this lack of notice does not make Article 111 unconstitutional, it makes it unfair.

The Due Process Clause of the Fifth Amendment[111] requires

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[105] John B. Sullivan *et al.*, *Lack of Observable Intoxication in Humans with High Plasma Alcohol Concentrations*, 32 J. FORENSIC SCI. 1660 (1987).

[106] *See infra* notes 111-18 and accompanying text.

[107] *See infra* notes 119-31 and accompanying text.

[108] *See infra* notes 132-40 and accompanying text.

[109] *See generally* 54 A.L.R.4th 149 (1990).

[110] *See infra* notes 141-54 and accompanying text.

[111] U.S. CONST. amend V.

that a criminal statute adequately notify the accused of the conduct it prohibits; if it fails to adequately define the prohibited conduct, it is unconstitutionally vague.[112] The courts have generally found that per se drunk driving statutes like Article 111 are not unconstitutionally vague, because they adequately notify individuals that they may not drive after consuming excessive amounts of alcohol.[113]

However, it is difficult to tell how much alcohol one can consume before attaining the breath alcohol concentration proscribed by Article 111. As discussed above, the effect of alcohol on one's breath alcohol concentration may have little to do with the physical symptoms of intoxication. The uncertainty in Article Ill's per se breath alcohol proscription violates the same public policy concerns underlying the vagueness component of the Due Process Clause.

Many of the courts that have rejected vagueness challenges to per se drunk driving statutes have pointed out that charts are readily available to the public which can be used to estimate with reasonable certainty the number of drinks necessary to reach a certain blood alcohol concentration.[114] These courts also have pointed out that a person of ordinary intelligence should know that moderation is a simple means of ensuring compliance with a per se statute.[115]

While determining precisely how much alcohol one may consume before achieving a proscribed blood alcohol concentration is difficult, it is possible to ***estimate*** this amount.[116] However, it is much more difficult to estimate one's ***breath*** alcohol concentration. Because a test based on breath alcohol concentration can overestimate blood alcohol concentration by as much as 100%,[117] the charts and physical symptoms used to determine blood alcohol levels may be misleading in determining breath alcohol concentrations. ***An*** individual may correctly determine that two drinks will keep his or her blood alcohol concentration under .10 percent but find that his or her breath alcohol concentration exceeds .10 grams per 210 liters of breath.

Arguably, the breath alcohol concentration in Article 111 is high enough that anyone that reaches it will be impaired. However,

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[112]*See* **Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).**

[113]**State v. Tanner, 472 N.E.2d 689, 692 (Ohio 1984); Burg v. Municipal Court, 673 P.2d 732, 741 (Cal. 1983); Roberts v. State, 329 So.2d 296 (Fla. 1976); State v. Bock, 357 N.W.2d 29, 34 (Iowa 1984).**

[114]*Burg*, **673 P.2d at 742; Tanner, 472 N.E.2d at 692.**

[115]*Tanner*, **472 N.E.2d at 692.**

[116]**Dominick A. Labianca, *Estimation of Blood-Alcohol Concentration*, 69 J. CHEMICAL EDUC. 628 (1992).**

[117]*See supra* **notes 75-77 and accompanying text.**

the problem with Article 111 is not how high the proscribed breath alcohol concentration is set, but the uncertainty an individual experiences in determining his or her breath alcohol concentration. Whether the prohibited breath alcohol concentration is set at .20 or .02 grams per 210 liter of breath, the problem is the same; an individual is unable to reasonably determine, based on charts, physical symptoms, or other means, whether he or she has exceeded the limit.

Arguably, the individual driver should bear the risk of determining whether he or she has exceeded the proscribed breath alcohol concentration. Prudent individuals will not drink any alcohol before driving and, therefore, will never run the risk of violating Article 111. However, Article 111 does not prohibit driving with ***any*** alcohol in one's system; it only proscribes driving while drunk or with a certain blood or breath alcohol concentration. Therefore, Article 111 notifies individuals that they *may* drive with some alcohol in their system. The problem with Article 111 is that it may be deceptively difficult to tell what this amount is.

No other criminal offense places the risk of this kind of uncertainty on the accused. Arguably, speeding, a much less serious offense, places a similar risk of uncertainty on the accused, because a motorist is guilty of this offense regardless of whether he or she knew he or she was travelling above the proscribed speed.[118] However, in the case of speeding, there are accurate indicia which notify motorists when they are approaching the proscribed speed, such as speedometers and movement relative to other traffic. The uncertainty in Article Ill's per se breath alcohol proscription is the equivalent of requiring a motorist to assume the **risk** of speeding without providing her with a speedometer or allowing her to look out the window, but instead only permitting her to estimate speed indirectly, such as by monitoring the internal speed of the vehicle's engine.

Because it is deceptively difficult to determine when one's breath alcohol concentration has exceeded .10, it is unfair to require individuals to assume the **risk** of making this determination. This is especially true when more accurate measures of an individual's intoxication, such as blood alcohol tests, are available. This unfairness justifies amendment of Article 111.

B. Irrebuttable Presumption

Drunk driving statutes are designed to prevent intoxicated per-

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[118] *See, e.g.*, **Williams v. Commonwealth, 365 S.E.2d 340 (Va. Ct. App. 1988) (in speeding case only issue is whether accused's vehicle was operating in excess of speed limit; incorrect speedometer will not bar prosecution).**

sons from driving, based on the premise that intoxicated drivers cause traffic accidents.[119] Article 111 prohibits driving with a breath alcohol concentration of .10 or greater based on this same premise; such persons are presumed to be intoxicated and, therefore, dangerous. This is equivalent to an irrebuttable presumption that persons with a breath alcohol concentration in excess of .10 are drunk. Unfortunately, as discussed above, this presumption is not always accurate.

Irrebuttable presumptions violate the Due Process Clause of the Fifth Amendment[120] because they improperly shift the burden of proof to the accused and prevent the accused from presenting a defense.[121] However, an overwhelming majority of the courts have held that per se drunk driving statutes, like Article 111, do not create an unconstitutional irrebuttable presumption. The courts have drawn a distinction between those statutes which create presumptions that can be used to prove the elements of a crime and other statutes, like Article 111, which redefine the elements themselves. Courts generally have upheld the latter type of statutes.[122]

However, logically there is no difference between an unconstitutional irrebuttable presumption that a person with a certain breath or blood alcohol concentration is drunk and the per se rule contained in Article 111.[123] Article 111 simply avoids the issues surrounding irrebuttable presumptions by making it a crime for a vehicle operator to have a .10 breath alcohol concentration.

The courts have upheld per se drunk driving statutes for the same reason that legislatures enact them; they believe that they are necessary to effectively prosecute drunk driving cases.[124] Arguably, without drunk driving statutes which base criminality on a particular blood or breath alcohol concentration, prosecuting drunk drivers would be extremely difficult.[125] Sobriety tests and other methods of proving intoxication are difficult to perform and yield uncertain results, while blood and breath alcohol tests appear to produce much more quantifiable results.

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[119] *See supra* note 12.

[120] U.S. CONST. amend. V.

[121] Sandstrom v. Montana, 442 U.S. 510 (1979).

[122] Coxe v. State, 281 A.2d 606 (Del. Supr. 1971); Lester v. State, 320 S.E.2d 142 (Ga. 1984).

[123] *See* Jonathan D. Cowan, Guilt *by* Presumption, 4 CRIM. JUST. Spring 1989, at 4; GIANELLI & IMWINKELREID, supra note 49, § 22-8(C), at 267-68.

[124] People v. Schmidt, 478 N.Y.S.2d 482 (1984).

[125] GIANELLI & IMWINKELREID, *supra* note 49, § 22-2 at 198-99.

This logic may justify the per se acceptance of blood alcohol tests, which have long been accepted as relatively reliable indicators of intoxication. However, the logic does not apply equally well to breath alcohol tests, which have always been recognized as less accurate.[126]

This does not mean that breath alcohol tests are never an accurate measure of blood alcohol concentration or one's ability to drive; they often are. The problem is that they are sometimes significantly inaccurate. For example, if breath alcohol tests significantly overestimate one's blood alcohol concentration or degree of intoxication only one percent of the time,[127] the presumption underlying Article 111 would still be unfair. In this case, the irrebuttable presumption that breath alcohol tests accurately correlate to blood alcohol concentration and degree of intoxication would prevent one percent of those charged with drunk driving from presenting a legitimate defense.

Article 111 prevents the accused from presenting a defense to the same extent as an irrebuttable presumption; it prohibits service members from introducing evidence that their breath alcohol concentration did not accurately indicate their blood alcohol concentration or level of intoxication. For example, if the accused attempts to introduce evidence that a breath test overestimated his blood alcohol concentration because the ratio between his breath and blood alcohol concentration is unusually low, this information will be excluded as irrelevant.[128] Furthermore, if the accused attempts to introduce evidence that he was not intoxicated, this also will be excluded as irrelevant.[129]

No other criminal offense is based on this type of presumption. For example, speeding, a much less serious offense, is based on a rel-

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[126] Mason & Dubowski, *supra* note 45, at 12.

[127] Studies comparing simultaneous breath and blood alcohol tests have shown deviations of over 15% between the two test results in a significant number of cases; the number of individuals who demonstrated this deviation in each study ranged from 2 to 62% of the individuals tested. The deviation varied greatly depending on the study and the breath testing device used. Most studies showed that breath tests underestimated blood alcohol concentrations, but in some cases the tests overestimated blood alcohol level. Id. at 16. Because most of the studies were made under controlled conditions, comparison under field conditions undoubtedly would yield even greater disparity between breath and blood alcohol test results. Id. at 21. One study indicated that the Breathalyzer materially overestimated blood alcohol levels potentially to the detriment of the accused 2.3% of the time. GIANELLI & IMWINKELREID, *supra* note 49, § 22-3(B), at 212-13.

[128] *See, e.g.*, People v. Ireland, No. H012609 (Cal. Ct. App. 6th Dist. Mar. 28, 1995) (evidence of inaccuracy of partition ratio was irrelevant in prosecution under California's per se drunk driving statute).

[129] *See* Lester v. State, 320 S.E.2d 142, 144-5 (Ga. 1984).

atively direct measurement of the unwanted conduct: driving at excessive speeds, which causes accidents.[130] If speeding were based on an indirect measurement, such as the internal speed of the engine, few would argue that motorists should not be able to prove lack of correlation between engine speed and vehicle speed in their defense. Yet Article 111 does precisely that; it prevents the accused from proving that there is a lack of correlation between the indirect measurement, breath alcohol concentration, and the unwanted conduct, intoxicated driving.

Per se drunk driving statutes, like Article 111, rely on this presumption because breath alcohol concentration is easier to measure than degree of intoxication. Breath alcohol tests yield results that appear to be more accurate, easier to quantify, and less subjective than field sobriety tests. However, given the potential inaccuracy of breath alcohol concentration as a measure of intoxication, incorporating breath alcohol concentration into per se drunk driving statutes like Article 111 is inappropriate. This is especially true because blood alcohol concentration, a more accurate measure of intoxication,[131] can be measured with relative ease.

C. Discrimination

Article 111's per se breath alcohol proscription discriminates against women and minorities because breath alcohol tests tend to overestimate their blood alcohol concentrations. Studies have shown that breath alcohol tests overestimate the blood alcohol concentrations of African Americans because they have smaller lung capacities and higher breath-to-blood-alcohol ratios.[132] Breath tests also overestimate the blood alcohol concentrations of women, because they have smaller lung capacities and higher temperatures.[133]

The constitutional principle of equal protection[134] generally prohibits discrimination based on race[135] or gender.[136] However, the courts have generally found that per se drunk driving statutes based

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[130] *See, e.g.*, VA. CODE ANN. § 46.2-878 (Michie 1995). Under the Virginia speeding statute, vehicle speed measurements of radar and laser speed detection devices are prima facie evidence of the actual speed of vehicles. *Id.* § 46.2-882.

[131] *See* Simpson, *supra* note 88, at 364.

[132] State v. Brayman, 751 P.2d 294, 302-03 (Wash. 1988).

[133] *Id.* at 303-04. **See** *also* GIANELLI & IMWINKELREID, *supra* note 49, § 22-3(B), at 211.

[134] Although the Equal Protection Clause of the Fourteenth Amendment does not apply to the federal government, the Due Process Clause of the Fifth Amendment, which does apply to the federal government, contains an equal protection component. U.S. CONST. amends. V, XIV, § 1; Bolling v. Sharpe, 347 U.S. 497 (1954).

[135] *Id.*

[136] Weinberger v. Wiesenfeld, 420 U.S. 637 (1975).

on breath alcohol concentrations do not violate this equal protection principle.[137] A statute like Article 111, which is not discriminatory on its face, but only discriminatory in its effect, will not violate the constitutional principle of equal protection unless Congress intended to discriminate when it enacted the statute.[138] Because there is no evidence that Congress had any intent to discriminate when it adopted Article Ill's per se breath alcohol proscription,[139] the statute is not unconstitutional.

Although this discriminatory impact is not unconstitutional, it is unfair. Using the speeding comparison again, Article Ill's *per se* breath alcohol proscription would be like measuring speeding based on engine speed, rather than vehicle speed, even though studies showed that minorities and females generally drive vehicles with "higher engine speeds." Although such a discriminatory effect would not be unconstitutional, it would certainly give legislators adequate justification to amend the statute.

Such a discriminatory effect should be especially offensive in the military. Numerous regulations prohibit discrimination within the military.[140] Even unintentional discrimination, like that engendered by Article 111, should be eliminated to the extent possible.

Article Ill's discriminatory impact could be eliminated by reliance on blood alcohol concentration, rather than breath alcohol concentration. Because the discrimination results largely from the higher breath-to-blood-alcohol ratios of minorities and women, blood tests would be a nondiscriminatory measure of intoxication.

D. Effect of Drunk Driving Convictions in the Military

The scientific and legal problems with Article 111 are exacerbated by the devastating effect of a drunk driving conviction in the military. A drunk driving conviction under Article 111 directly impacts a service member's career, because the service member is

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[137] *Brayman*, 751 P.2d at 305.

[138] *See* Washington v. Davis, 426 U.S. 229 (1976).

[139] H. CONF. REP. NO. 102-966, 102d Cong., 2d Sess. (1992), *reprinted in* 1992 U.S.C.C.A.N. 1769, 1849.

[140] *See, e.g.*, DEP'T OF DEFENSE, DIRECTIVE 1350.2, THE DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY PROGRAM (23 Dec. 1988); DEP'T OF ARMY, REG. 600-20, PERSONNEL-GENERAL: ARMY COMMAND POLICY, ch. 6 (30 Mar. 1988) (104 17 Sept. 1993).

employed by the very organization in charge of the prosecution. As a result, it is especially important to ensure that the military's drunk driving statute is fair.

A service member who drives while drunk generally will be prosecuted by the military under Article 111 only in limited situations. In the United States, service members apprehended for drunk driving usually are prosecuted in civilian courts, rather than by the military.[141] If a service member already has been prosecuted for drunk driving by a civilian court, he or she ordinarily will not be prosecuted by the military under Article 111.[142] Consequently, most military prosecutions under Article 111 occur overseas. Although this reduces the impact of Article 111, it does not eliminate it entirely. It is still important to ensure that the military drunk driving law is fair.

The penalties under Article 111 are substantial. At a general court-martial, the maximum penalty for drunk driving under Article 111 is a six months confinement, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a bad-conduct discharge from the service.[143] If the offense is disposed of through nonjudicial punishment under Article 15, UCMJ,[144] the penalties may include thirty days correctional custody,[145] forfeiture

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[141]Service members who are apprehended for drunk driving off post ordinarily are prosecuted in state courts while service members apprehended for drunk driving on post ordinarily are prosecuted before a United States magistrate judge. Memorandum of Understanding Between Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes (22Aug. 1964).

[142]*See, e.g.*, DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 4-2 (8 Aug. 1994) [hereinafter AR 27-10], which provides that a soldier who already has been tried in a civilian state or foreign court may, but ordinarily will not, be tried by court-martial or receive nonjudicial punishment for the same offense. If the accused was tried in a federal court, he or she may not be tried by court-martial or receive nonjudicial punishment for the same offense. MCM, *supra* note 18, R.C.M. 907(b)(2)(C), pt. V, para. 1(f)((5).

[143]MCM, *supra* note 18, pt. IV, para. 35e(1). If the accused has three final previous convictions adjudged within the past year, the maximum punishment increases to one-year confinement, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge. *Id.* R.C.M. 1003(d)(1). If the accused's drunk driving involved personal injury, the maximum confinement increases to confinement for 18 months, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge. *Id.* pt. IV, para. 35e(2). If the accused is an officer, a dismissal, rather than a bad conduct or dishonorable discharge, is included in the maximum punishment for any of these offenses. *Id.* R.C.M. 1003(b)(9)(A).

[144]UCMJ art. 15 (1988).

[145]Correctional custody is only authorized for enlisted soldiers in pay grades of E-3 and below. MCM, *supra* note 18, pt. V, para. 5c(4). Officers may be sentenced to 30 days arrest in quarters. *Id.* pt. V, para. 5b(1)(B)(i).

of half pay for two months,[146] restriction for sixty days,[147] extra duty for forty-five days,[148] and reduction to the lowest enlisted grade.[149] The record of this nonjudicial punishment may be filed in the service member's permanent military record.[150]

Additionally, several adverse administrative actions are taken when a service member is convicted of drunk driving. In the Army, all officers, warrant officers, and noncommissioned officers convicted of or receiving nonjudicial punishment for drunk driving under Article 111 must receive a reprimand from a general officer,[151] which can be filed in the individual's permanent personnel file.[152] In addition, a soldier's on-post or overseas driving privileges must be revoked for at least one year if he or she is convicted of or receives nonjudicial punishment for drunk driving under Article 111.[153]

Many of the same adverse administrative actions will be taken if a service member is convicted under a state drunk driving statute.[154] Therefore, the fairness of state drunk driving statutes is also an important consideration. However, not all state drunk driving statutes contain a per se proscription based on breath alcohol concentration, like Article 111. Furthermore, just because many state statutes rely on the inaccurate breath alcohol concentration, does not mean that Article 111 also should rely on it.

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[146] *Id.* pt. V, paras. 5b(1)(B)(ii), 5b(2)(B)(iii).

[147] *Id.* pt. V, paras. 5b(1)(B)(iii), 5b(2)(B)(vi). Restriction of enlisted personnel must be limited to 45 days if extra duty is also imposed. Id. pt. V, para. 5d(4).

[148] Extra duty may only be imposed on enlisted soldiers. Id. pt. V, para. 5b(2)(B)(v).

[149] Only enlisted soldiers in pay grades below E-7 may be reduced. Soldiers in the grades of E-5 and E-6 can only be reduced by one grade during peacetime. Id. pt. V, para. 5b(2)(B)(iv).

[150] In the Army, for example, it will be filed in the soldier's Official Military Personnel File (the permanent military performance record) if the soldier serves in the pay grade of E-5 or higher prior to punishment. However, it is possible for the nonjudicial punishment record to be filed in a "restricted fiche" portion of the Official Military Personnel File; this portion of the file is not normally viewed by career managers or selection boards. **AR** 27-10, *supra* note 142, para. 3-37b.

[151] DEP'T OF ARMY, REG. 190-5, MOTOR **VEHICLE** TRAFFIC SUPERVISION, para. 2-7, glossary, sect. II (8 July 1988) [hereinafter AR 190-5]. The same penalty applies if a soldier: (1) refuses to take a blood, breath, or urine test when there is **a** reasonable belief that he or she is driving under the influence of alcohol or drugs; (2) drives on post with a blood alcohol content of .10 percent; **(3)** drives off post with a blood alcohol content in violation of state law; or (4) drives when a chemical test reflects the presence of drugs. Id. In addition, the same penalty applies if a soldier receives **a** civilian conviction for drunk driving. Id. glossary, sect. 11.

[152] DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION, para. 3-4.b (19 Dec. 1986).

[153] AR 190-5, *supra* note 151, para. 2-5.b(3).

[154] *See supra* note 131.

The countervailing argument is that Article 111 should be similar to state drunk driving statutes to ensure that service members are treated the same whether they are prosecuted in state court or stationed overseas and prosecuted under Article 111. The per se breath alcohol proscription was added to Article 111 to make it consistent with civilian jurisdictions.[155] However, given the devastating effect of a drunk driving conviction in the military, it makes sense to pattern the military drunk driving statute after those state statutes that are most fair. The fairest state statutes do not contain a per se proscriptions based on breath alcohol concentrations.

As a practical matter, a drunk driving conviction usually results in the termination of a service member's career. This administrative consequence is typically much more devastating for service members than a drunk driving conviction is for a civilian.

VI. Amending the Statue

There are several ways of amending Article 111 to make it more fair. The easiest and most appropriate would be to eliminate the statute's reference to breath alcohol concentration, but leave its referrence to blood alcohol concentration intact.[156] This would make Article 111 fairer because, while blood alcohol concentration relatively directly affects one's ability to drive, breath alcohol concentration may have little relation to one's blood alcohol concentration or ability to drive.

Many civilian drunk driving statutes contain proscriptions based on blood alcohol concentrations without a corresponding proscription based on breath alcohol concentrations.[157] Although these

[155] *See* ***supra*** note 16 and accompanying text.

[156] Article 111 could be amended as follows (language to be deleted is crossed out; language to be added is italicized):

> Any person subject to this chapter who—
>
> (1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title (article 112a(b)) [controlled substances], or
>
> **(2)** operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood ~~or breath~~ is 0.10 grams or more of alcohol per 100 milliliters of blood, ~~or 0.10 grams or more of alcohol per 210 liters of breath~~ as shown by chemical analysis of the ***person's blood or breath***
>
> shall be punished as a court-martial may direct.

[157] ALA. CODE § 32-5A-191(a)(1) (1994); ARK. CODE ANN. § 5-65- 103(b) (Michie 1993); CONN. GEN. STAT. ANN. § 14-227a(a) (West 1994); DEL. CODE ANN. tit. 21 § 4177(b) (1994); GA. CODE ANN. § 40- 6-391(a)(4) (1995); IND. CODE A". § 9-30-5-1(a) (Burns 1994); LA. REV. STAT. A". § 14:98(A)(2) (West 1995); ME. REV. STAT. ANN. tit. 29, § 1312-B(1)(B) (West 1994); MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West 1995); MISS. CODE ANN. § 63-11-30(1)(c) (1995); NEV. REV. STAT. ANN. § 484.379(1)(b), (c) (Michie 1994); N.J. STAT. A". § 39:4-50(a) (West 1995); N.Y. VEH. & TRAF. LAW 9 1192

statutes do not permit defendants to raise inaccuracies inherent in blood alcohol tests, they do avoid the greater problems inherent in breath alcohol tests.

Amending Article 111 to eliminate the breath alcohol reference would still permit prosecutors to rely on scientific tests. Prosecutors could use blood alcohol tests, which are a much more direct measure of intoxication than breath tests. In addition, prosecutors could still introduce breath alcohol tests, because they are relevant to determining the accused's blood alcohol concentration.[158]

Arguably, eliminating the breath alcohol concentration from Article 111 would make it unnecessarily difficult for military prosecutors to establish a prima facie case. The prosecutor would have to produce expert testimony to establish the correlation of breath to blood alcohol concentrations.[159] However, this could be established by the police officer who operated the breath alcohol device, assuming that he or she has sufficient training in the scientific principles underlying the test.[160] If the police officer does not have sufficient training, the correlation between breath and blood alcohol concentrations could be established by other local witnesses, such as physicians or other medical personnel.[161] Therefore, eliminating the breath alcohol concentration from Article 111 would not place an unreasonable burden on the government in drunk driving cases.

Another method of amending Article 111 would be to change its per se proscription based on breath alcohol concentration into a rebuttable presumption.[162] This would place two standards in Article 111, a

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(2) (McKinney 1995); OR. REV. STAT. § 813.010(1)(a) (1994); PA. STAT. ANN. tit. 75, § 3731(a)(4), (5) (Purdon 1995); R.I. GEN. LAWS § 31-27-2(b)(1) (1994); S.C. CODE ANN. § 56-5-2950(b)(3) (Law. Co-op 1994); S.D. CODIFIED LAWS ANN. § 32-23-1(1) (1995); TENN. CODE ANN. §§ 55-10-401 and 55-10-408(b) (1994); W. VA. CODE § 17C-5-2(d) (1995).

[158]Most state drunk driving statutes that do not contain a reference to a breath alcohol concentration still allow the prosecutor to introduce breath alcohol tests to prove the blood alcohol concentration. *See, e.g.*, GA. CODE ANN. § 40-6-392(b) (1995).

[159]MCM, *supra* note 18, MIL. R. EVID. 702.

[160]*Id.*; State v. Young, 795 P.2d 285, 290 (Haw. App. 1990) (certified operator supervisor of Intoxilyzer was competent to testify about partition coefficient); see *also* United States v. Bowman, 10 C.M.R. 506, 507 (A.B.R. 1953) (medical laboratory technician testified as expert on results of blood alcohol test he performed). In the military, operators of breath testing devices must meet the certification requirements of the state where the installation is located. If the installation is located in a state or overseas area having a formal training or certification program, the operator must attend this training. Otherwise, the operator must attend training conducted by a civilian institution or the manufacturer of the breath testing device. AR 190-5, *supra* note 151, para. 4-10b.

[161]MCM, *supra* note 18, MIL. R. EVID. 702.

[162]Article 111 could be amended as follows (language to be deleted is crossed out; language to be added is italicized):

per se standard based on a blood alcohol concentration and a rebuttable presumption based on a breath alcohol concentration.

This bifurcated standard would enable prosecutors to easily establish a prima facie case based on a breath alcohol test. It also would allow the accused to fully and fairly litigate the problems with estimating blood alcohol concentrations based on breath alcohol concentrations.

The problem with such a bifurcated standard is that it would be unnecessarily complex. Practitioners and court members may have difficulty discerning the difference between the per se rule and the rebuttable presumption. The difficulty is unnecessary, since the total elimination of Article Ill's breath alcohol reference, as suggested above, would still allow prosecutors to introduce breath alcohol tests to demonstrate blood alcohol concentration.[163]

Several states currently have drunk driving statutes containing both per se provisions and rebuttable presumptions.[164] However, none of these statutes contains both a per se standard based on blood alcohol concentrations and a rebuttable presumption based on breath alcohol concentrations.[165] States unwilling to accept the

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Any person subject to this chapter who—

(1) operates or physically controls any vehicle, aircraft, or vessel in a reckless or wanton manner or while impaired by a substance described in section 912a(b) of this title (article 112a(b)) [controlled substances], or

(2) operates or is in actual physical control of any vehicle, aircraft, or vessel while drunk or when the alcohol concentration in the person's blood ~~or breath~~ is 0.10 grams or more of alcohol per 100 milliliters of blood, ~~or 0.10 grams or more of alcohol per 210 liters of breath,~~ as shown by chemical analysis *of the person's blood or breath, provided that if a person has a breath alcohol concentration of 0.10 grams or more of alcohol per 210 liters of breath, this shall be prima facie evidence that his or her blood alcohol concentration is 0.10 grams or more of alcohol per 100 milliliters of blood,*

shall be punished as a court-martial may direct.

[163]*See supra* notes 160, 161 and accompanying text.

[164]For example, *see* GA. CODE ANN. §§ 40-6-391(a)(4), -392(b)(3) (1995). This statute contains a per se provision prohibiting driving with a blood alcohol concentration of .10 percent or more and a presumption that a person is intoxicated if his or her blood alcohol level is .08 percent or more.

[165]ALA. CODE § 32-5A-191(a)(1) (1994); ALASKA STAT. § 28.35.030(a)(2) (1994); ARIZ REV. STAT. ANN. § 28-692(B), (N) (1994); ARK. CODE ANN. § 5-65-103(b) (Michie 1993); CAL. VEH. CODE § 23152(b) (West 1995); COLO. REV. STAT. A". § 42-4-1301(2)(a) (West 1994); CONN. GEN. STAT. ANN. § 14-227a(a) (West 1994); DEL. CODE ANN. tit. 21 § 4177(b) (1994); FLA STAT. ANN. ch. 316.193(1)(b) (Harrison 1993); GA. CODE ANN. § 40-6-391(a)(4) (1995); HAW. REV. STAT. § 291-4(a)(2) (1994); IDAHO CODE § 18-8004(1)(a) (1995); ILL. REV. STAT. ch. 625, paras. 5/11-501, 501.2 (1995); IND. CODE ANN. § 9-30-5-1(a) (Burns 1994); IOWA CODE ANN. § 321J.1.1.b, .2.1.b (West 1995); KAN. STAT. ANN. § 8-1567(a)(1) (1994); KY. REV. STAT. ANN. § 189A.010(1)(a) (Michie/Bobbs-Merrill 1994); LA. REV. STAT. ANN. § 14:98(A)(2) (West 1995); MD. CODE ANN., CTS. & JUD. PRGC. § 10-307(e) (1995); MASS. GEN. LAWS ANN. ch. 90, § 24(1)(e) (West 1995); ME. REV. STAT. ANN. tit. 29, § 1312-B(1)(B) (West 1994); MICH COMP. LAWS

uncertainties inherent in breath alcohol tests apparently have adopted the simpler approach of defining drunk driving offenses based on blood alcohol concentrations alone.

VII. Conclusion

Article Ill's reliance on a per se breath alcohol standard is neither scientifically sound nor fair. Breath alcohol concentrations may have little to do with a person's blood alcohol concentration or degree of intoxication. Although the breath alcohol provision is not so unfair as to be unconstitutional, it should be eliminated. The most appropriate way to do this would be to eliminate Article Ill's reference to breath alcohol concentration altogether.

Such an amendment should not be made without adequate study. Undoubtedly, further inquiry will be required before such an amendment is seriously considered. This article is designed to be the first "salvo" in that inquiry.[166]

ANN. § 257.625(1)(b) (West 1995); MI". STAT. *A".* §§ 169.01(61), .121(1)(d), .121(1)(e) (West 1995); *MISS.* CODE *A".* § 63-11-30(1)(c) (1995); Mo. *ANN.* STAT. § 577.012(1) (Vernon 1996); MONT. CODE ANN. §§ 61-8-406, -407 (1993); NEB. REV. STAT. § 60-6,196(1)(b), (c) (1993); NEV. REV. STAT. *ANN.* § 484.379(1)(b), (c) (Michie 1994); N.H. REV. STAT. *ANN.* §§ 259:3-a, 265:82(1)(b) (1994); N.J. STAT. *ANN.* § 39:4-50(a) (West 1995); N.M. STAT. ANN. §§ 66-8-102(C), -110(E) (Michie 1994); N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 1995); N.C. GEN. STAT. §§ 20-4.01(0.2), - 138.1(a)(2) (1993); N.D. CENT. CODE §§ 39-06.2-02(2), 39-08- 01(1)(a) (1995); OHIO REV. CODE ANN. § 4511.19(A)(2), (3) (Page 1994); OKLA. STAT. ANN. tit. 47, §§ 11-902(A)(1), 756(5) (West 1995); OR. REV. STAT. § 813.010(1)(a) (1994); PA. STAT. *A".* tit. 75, § 3731(a)(4), (5) (Purdon 1995); R.I. GEN. LAWS § 31-27- 2(b)(1) (1994); S.C. CODE *A".* § 56-5-2950(b)(3) (Law. Co-op 1994); S.D. CODIFIED LAWS *ANN.* § 32-23-1(1) (1995); TENN. CODE *ANN.* 0B 55-10-401 and 55-10-408(b) (1994); TEX. PENAL CODE ANN. §§ 49.01, .04(a) (West 1995); UTAH CODE *A".* § 41-6-44(1)(a)(i), (2) (1995); VT. STAT. *A".* tit. 23, §§ 1200(1), 1201(a)(1) (1994); VA. CODE *A".* § 18.2-266(i) (Michie 1995); WASH. REV. CODE ANN. §§ 46.61.502(1)(a), 506(2) (west 1995); W. VA. CODE § 17C-5-2(d) (1995); WIS. STAT. *A".* § 346.63(1)(b) (West 1990); WYO. STAT. § 31-5-233(a)(i), (b)(i) (1995).

[166] *See generally id.*

TOWARD THE SIMPLIFICATION OF C M L SERVICE DISCIPLINARY PROCEDURES

HONORABLE RICHARD W. VITARIS*

The processing of federal civil service adverse actions is a highly legalistic and complex endeavor. Because this system is, despite the involvement of a large number of lawyers, still run predominantly by laymen, there are numerous procedural pitfalls for the unwary which do not further the interests of justice. Simplification of the adverse action process is needed to ensure fairness to both federal agencies and federal employees alike.

This article provides a framework for understanding and evaluating the problems with the current system, and proposes changes calculated to make the civil service disciplinary system more "user friendly," while bringing about fairer and more predictable outcomes, that will further the interests of all parties, and the public.

I. Introduction

Disciplining of civil service employees is a management function. However, the current laws[1] governing discipline[2] of employees are complicated and highly legalistic. Most federal managers are not lawyers, nor are the union officials who represent most employees in this system. Accordingly, many agencies are forced to use attorneys

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[1] 5 U.S.C. § 7501; 5 C.F.R. pts. 752, 1201 (1995).

[2] In civil service parlance, the term "adverse action" is used to refer to disciplinary actions that include or are more serious than suspension for more than 14 days. *See* 5. C.F.R. § 752.401(a) (1995). Such adverse actions are, generally, appealable to the Merit Systems Protection Board (MSPB or Board). 5 U.S.C. §§ 7512, 7513(d) (1995). The term "disciplinary action" is often used to refer to disciplinary actions less serious than suspension for 14 days or less. In this article, the term disciplinary action refers to all forms of discipline against a federal employee.

as agency representatives, even though that function was previously performed by personnel specialists. Many employees are likewise forced to retain attorneys to ensure that their rights are fully protected. Attorneys will always be involved in significant or complex cases and, even in the most routine cases, representation by attorneys is in the best interest of both sides. But the civil service disciplinary system should not be so complicated that attorneys must be involved in every action.

Two hypotheticals will introduce the problem. In the first, the complicated and legalistic rules work an injustice on a federal agency. In the second hypothetical, the rules work an injustice on a federal employee.

The first hypothetical concerns the strict rules of pleading. Simply put, the rules of pleading in disciplinary actions are stricter than those used in the criminal justice system for criminal charges. Because the pleading is done by laypersons, unfair results are not uncommon and this hypothetical demonstrates the point powerfully:

Hypothetical One

A, an employee of the Department **of** Agriculture, goes to the office on a Saturday and removes a government computer, taking it home. *B, A*'s supervisor, goes to the office on Sunday and discovers that *A's* computer is missing. He calls the police to report the missing computer. The police examine the sign in sheet for the weekend and discover that **A** was the only agency employee to *go* to the office on Saturday. The police go to *A*'s home, and ask him about the missing computer. He admits that he has it, and turns it over to the police. On Monday, *B* issues a notice of proposed removal to **A,** alleging that on Saturday, "you stole a computer belonging to the agency." **A** makes neither an oral or written reply to C, the deciding official, concerning the proposed action. C sustains the charge, and **A** is removed from the civil service. **A** appeals to the Merit Systems Protection Board (MSPB **or** Board). At the hearing, **A** testifies that he was only borrowing the computer to write a term paper for an evening college course he was taking. **A** explains that he had previously "borrowed))the computer for that purpose and always brought it back to the office early Monday morning. The Board's administrative judge concludes that **A** was a truthful witness and that he did not have an intent to permanently deprive the agency of the use and benefit **of** the computer.

The agency's personnel specialist was not a lawyer and did not know the legal distinction between theft and wrongful appropriation. Therefore, he drafted the charge in simple, laymen's terms—that A "stole a computer." Unfortunately for the agency, however, the Board has held that, to sustain a charge of theft, the agency must prove that the employee intended to permanently deprive the owner of the use and benefit of the property.[3] Therefore, given his factual findings, the administrative judge has no choice in Hypothetical One but to reverse the employee's removal. Furthermore, even though "borrowing" government property for personal use is also wrong, the agency cannot rely on this. The Board has held that an administrative judge cannot change the nature of the charge that was alleged in the notice of proposed removal.[4] When an agency has not alleged lesser-included offenses, it would be improper for the Board to consider them.[5] Thus because our naive personnel specialist also failed to allege that A had misused his government computer, A probably cannot be found liable.[6] Surely, such an outcome does not promote the efficiency of the federal service.

What is remarkable about Hypothetical One is that had A been charged criminally with theft of the computer and offered the same defense, he could have been convicted of the lesser-included offense of "wrongful appropriation." In contrast to civil service law, no requirement in criminal law exists to specifically allege lesser-included offenses.[7] Why must charges in civil service law be drafted

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[3] Nazelrod v. Department of Justice, 50 M.S.P.R. 456, 459-61 (1991), *aff'd sub nom.*, King v. Nazelrod, 43 F.3d 664 (Fed. Cir. 1994). The Board noted that although an agency generally need not prove that an employee violated a specific rule or policy, and need only prove that the adverse action was taken "for such case as will promote the efficiency of the service," where an agency alleges that an employee committed a *criminal offense,* it must prove the elements of the crime. Id. at 459.

[4] *See* Friese v. Department of Justice, 45 M.S.P.R. 210, 214-15 (1990). Where the recharacterization of the charge imposes stricter proof requirements, however, the error may be harmless. *Id.*

[5] *Nazelrod, 50* M.S.P.R., at 461.

[6] An agency is not precluded from renewing an adverse action based on charges brought in an earlier proceeding where the adverse action in that proceeding was invalidated on procedural grounds. *See* Mavronikolas v. United States Postal Service, 39 M.S.P.R. 442, 445 (1989). Thus far, the Board has not ruled as to whether an agency's error in charging an employee with a greater offense, rather than a lesser-included offense, is a procedural or a substantive defect. Therefore, an argument can be made that, after reinstating the employee, giving him back pay, and possibly even attorney fees, the agency may issue a new notice of proposed removal (or less disciplinary action) alleging the proper charge and begin the process all over again. However, such an outcome, even if possible, hardly promotes judicial eficiency and economy.

[7] Under the *Federal Rules of Criminal Procedure,* the defendant may be found guilty of an offense necessarily included in the offense charged, or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense. *See* FED. R. CIV. P. 31(c).

with more precision than charges in criminal law where the potential sanction is far greater?

The second hypothetical concerns application of the Board's strict time limits and confusing aspects of the Whistleblower Protection Act.

Hypothetical Two

> **A,** a white employee, is a branch chief. *B,* an African-American employee, is in **A's** branch. *B* is applying for a vacant branch chief position. **A** goes to division chief C, who is the selecting official for the vacancy and *A*'s boss. **A** tells *C* that *B* is an outstanding employee who should be seriously considered for the vacant branch chief position. *C* responds by using racial epithets to describe *B* and states that he will never promote a black to a branch chief position. **A** has never considered himself to be a whistleblower, but is outraged. By *C*'s blatant discrimination. **A** goes to the agency's EEO office to disclose *C*'s racial animus and intent to discriminate. By the time he leaves the office, **A** considers himself to be a whistleblower. *C* learns of *A*'s disclosure to the EEO office and is furious. In retaliation, *C* falsely tells *D,* C's boss, that **A** threatened to assault him. Based on this trumped up charge, **A** is removed. **A** applies to the Office of Special Counsel, (*OSC*), who investigates retaliation based on whistleblowing. After two months, **A** has still received no reply.

A's hope for justice will be short lived. When **A** complained to the EEO office about *C*'s discrimination, **A** engaged in protected EEO activity,[8] but retaliation based on EEO activity is not whistleblowing.[9] Sooner or later, the OSC will inform **A** that it cannot help him. By the time **A** seeks to file an EEO complaint or to file an appeal of his removal with the Board, his complaint and appeal will be likely dismissed as untimely filed.[10]

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[8]Title VII makes it an unlawful employment practice for any employer to discriminate against an employee "because he has made a charge, testified, assisted; or participated in any manner in an investigation, proceeding, or hearing under this title." 42 U.S.C. § 2000e-3(a). "Participation in any manner" has been broadly construed and would appear to protect an employee who discloses to the EEO office that a supervisor has discriminated against a coworker based on race. ***See,*** *e.g.*, BARBARA LINDERMAN SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 535 (2d ed. 1990). That Title VII places the same obligations on federal as on private employers is generally accepted. McKinney v. Dole, 765 F.2d 1129, 1129, 1138 n.19 (D.C. Cir. 1985).

[9]Gonzales v. Department of Housing and Urban Development, 64 M.S.P.R. 314, 317 (1994).

[10]An appeal to the Board must be filed during the period beginning on the day after the effective date of the action being appealed and ending 30 days after the effective date. 5 C.F.R. § 1201.22. An individual must bring allegations of discrimina-

In my view, the processing of civil service disciplinary actions can and should be simplified to eliminate the injustice in these hypotheticals and the many other problems created by the undue complexity of the civil service law.

11. Develop a "by the Numbers" Procedural Guide

Despite the federal government's myriad publications, there is no single "by the numbers" procedural guide to assist a personnel specialist or manager to prepare a disciplinary action against a federal employee.[11] In my view, the Office of Personnel Management (OPM) should prepare such a manual ***now,*** and need look no further than the Department of Defense's *Manual* ***for*** *Courts-Martial*[12] *(Manual)* as an illustrative model.

In looking to the *Manual* as a model for the OPM to emulate, I am not suggesting that civil service law be made more like military law. Rather, I commend the *Manual* as a model because it is a good example of a well-written, comprehensive, by the numbers, proce dural rule book for a legal system. The *Manual* is understandable to laymen and is routinely used by commanders and enlisted legal clerks, who—like agency personnel specialists—are not attorneys. It contains codifications of legal principles written in plain English and model specifications for virtually every type of charge imaginable. Therefore, it serves as much a guide book as it does a rule book. More importantly, experience has shown that the *Manual* works.

I believe strongly that civil service law also needs a comprehensive procedural guide book, bottomed, of course, on civil service law principles rather than criminal law principles. This type of guide would leave plenty of room for lawyers and judges, while providing nonlawyer managers a tool to do what managers have historically always been allowed to do—to take disciplinary action against an employee without undue fear that the action will fail because of some technicalitv.

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tion—including retaliation claims—to an agency **EEO** counselor within **45** days of the date of the alleged discriminatory act. 29 **C.F.R.** § **1614.105(a)(2).** Based on my experience, it is unlikely that the OSC would notify individuals that it could not help them in sufficient time for them to timely file either **an** appeal to the Board or **an EEO** complaint. The Special Counsel could, however, independently "prosecute" the prohibited personnel practice of discrimination before the MSPB and seek "corrective action" for the employee. 5 U.S.C. §§ **2302(b)(1), 1214(b)(2).**

[11]The OPM previously published a well-written and useful handbook; **see** HOWARD J. **ASHNER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY** BEFORE THE **UNITED STATES MERIT SYSTEMS PROTECTION** BOARD (1984). Although the handbook would pay for itself if it prevented an agency from losing even a single removal action, the OPM did not keep it updated and it is now out of print.

[12]MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.).

Because no guidelines for the drafting of charges comparable to those contained in the *Manual* exist in civil service law, considerable litigation results over whether an employee has been correctly charged, and with what the agency is required to prove to prevail. A case in point concerns the decade-long attempts of the Department of the Army to remove Philip Hillen, a member of the Senior Executive Service, for sexual harassment. When the Army removed Mr. Hillen on a charge of "sexual harassment'' in 1985, it was not clear whether the charge was brought for violating Title VII which, at the time, required proof of a serious effect on the psychological wellbeing of the victim[13] or for violating the Army's own regulation concerning sexual harassment, which did not contain this requirement.'* The Board resolved the ambiguity in favor of the employee and found that the Army was required to prove a violation of Title VII.[15]

Nearly ten years later, the United States Court of Appeals for the Federal Circuit ruled that the Board erred in requiring proof of a serious effect on the psychological wellbeing of the victim under Title VII.[16] Clear guidelines on how to charge a violation of internal agency regulations could have prevented the disastrous *Hillen* litigation.

Like the *Manual,* the guidebook that I propose would set forth model specifications. While an agency would not be required to use the model specification, use of the specification would ensure both that the appellant was on proper notice of the charge, and that management knew precisely what it would be required to prove.

For example, the discussion of the charge of unauthorized use of government property might provide as follows:

> Unauthorized use of government property.
>
> *Use of this charge:* This charge is recommended for situations when an employee uses government property for personal use without authority.

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[13] Downes v. Federal Aviation Administration, 775 F.2d 288 (Fed. Cir. 1985). The Supreme Court has since held that psychological injury is not a necessary criterion of hostile environment sexual harassment. See Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370-71 (1993).

[14] An agency may require more stringent standards of behavior of its employees than that required by Title VIII. See Carosella v. United States Postal Service, 816 F.2d 638, 643 (Fed. Cir. 1987).

[15] *See* Hillen v. Department of the Army, 35 M.S.P.R. 453, 462 (1987).

[16] *See* King v. Hillen, 21 F.3d 1572, 1580 (Fed. Cir. 1994).

Greater offenses:[17] This charge is a lesser-included offense to the charge of theft of government property.

Lesser-included offenses: None.

Model specification: On [insert date] at [insert location of offense1 you used government property, to wit: [insert description of property], for personal use without authority.

Elements: (1) the appellant used the government property alleged; (2) the use occurred at the date and place alleged; (3) the appellant used the property for personal reasons; and (4) the use of the property was not authorized by the appellant's superiors.

Although this may seem obvious, the absence of this type of guidance currently causes confusion and burdensome litigation.

In *Burroughs v. Department of the Army,*[18] the appellant was charged with "directing the unauthorized use of Government materials, manpower and equipment for other than official purposes."[19] The agency based its charge on the appellant's instruction to an agency machinist to fabricate a part that was allegedly to be used for an agency project. On appeal to the Board, the administrative judge sustained the charge, finding that the work at issue had been done for an official purpose, but had not been authorized. The Board affirmed the administrative judge's initial decision.[20]

In *Burroughs*, the United States Court of Appeals for the Federal Circuit (Federal Circuit) reversed, holding that the Board could not split a single charge into several independent charges and then sustain one of the newly formulated charges, which represented only a portion of the original.[21] The Federal Circuit found that the original charge included, among others elements, that the use of the government property was unauthorized and that the use was for other than an official purpose. The Federal Circuit held that because the agency had proven only one of these required elements, the entire charge failed.[22]

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[17]Current Board practice does not allow for lesser-included offenses. This article will later discuss my proposal that lesser-included offenses be permitted. Because there is no statutory bar to consideration of lesser-included offenses, this change requires only sensible application of existing law and regulation.

[18]918 F.2d 170, 172 (Fed. Cir. 1990).

[19]*Id.* at 171.

[20]*Id.* at 171-72.

[21]*Id.* at 172.

[22]*Id.* The Federal Circuit contrasted the facts of the case with the situation where more than one event or factual specification is set out to support a single charge. ***See id.*** In that situation, it observed, proof of one or more, but not all, of the supporting specifications would be enough to sustain the charge. The appeal before us presents such a situation.

Had the type of guidance I propose been available to the agency in ***Burroughs,*** the elements of the charge would have been clear and unambiguous. Moreover, there would have been no question that the appellant was on adequate notice of them. [23]

A guidebook on drafting charges would also expedite disciplinary actions. Many agencies now require that charges drafted by a personnel specialist be reviewed by the agency's legal office because of the pitfalls inherent in the present system. Charges drafted based on model specifications, however, generally would not require legal review because their legal sufficiency would not be in doubt. In sum, the work involved in development of such a guidebook would, like the ***Manual,*** quickly pay for itself.[24]

III. Allow Lesser-Included Offenses

As seen in Hypothetical One,[25] because an agency is unable to bring lesser-included offenses, it must be more careful when drafting the charges to a disciplinary action appealable to the Board than a prosecutor needs to be in drafting criminal charges.

Why doesn't the Board allow lesser-included offense? The first mention of lesser-included offenses in a Board decision occurred in a theft case. In ***Major v. Department of the Navy,***[26] after determining that the administrative judge erred in finding that the agency had failed to prove an intent to steal, the Board added a footnote stating "since the agency only charged appellant with theft, any other or lesser offense may not be considered."[27] The Board cited no authority for this bit of ***obiter dictum.*** Nor did the Board explain why lesser offenses may not be considered. Nonetheless, the Board and its administrative judges applied that stray footnote.[28]

The logical import of the Federal Circuit's decision in ***Burroughs*** also bars consideration of lesser-included offenses,[29]

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[23] Although lack of adequate notice was not at issue in ***Burroughs,*** it is in many cases appealed to the Board. An employee must be given specific notice of the reasons for a proposed adverse action, *see* 5 U.S.C. § 7513(b)(1), and the charges in the notice must be set forth in sufficient detail to allow the employee to make an informed reply. Brook v. Corrado, 999 F.2d 523,526 (Fed. Cir. 1993).

"Criminal charges prepared by nonlawyers under the ***Manual are*** reviewed by lawyers before action is taken on the charges.

[25] *See supm* notes 4-6 and accompanying text.

[26] 31 M.S.P.R *283* (1986).

[27] *Id.* at 285 n.1.

[28] Nazelrod v. Department of Justice, 50 M.S.P.R. 456, 466 (1991), *aff'd sub nom.,* King v. Nazelrod, 43 F.3d 664 (Fed. Cir. 1994).

[29] *See supm* notes 18-22 and accompanying text.

because the Federal Circuit condemned the Board for splitting a single charge into several independent charges. As with the Board, the Federal Circuit does not explain what evil it seeks to prevent by barring consideration of lesser offenses.

The prohibition on the Board's consideration of lesser offenses makes little sense when one considers that the agency's deciding official can consider lesser-included offenses. In *Weaver v. Department of Agriculture*,[30] the deciding official did exactly what the Board had done in *Burroughs;* the deciding official split a single charge into a series of independent charges with common elements. He found the appellant not guilty of the greater offense, but sustained a lesser charge. The administrative judge in *Weaver* applied the then recently decided *Burroughs* decision and reversed the agency action.[31] On petition for review, the Board reversed the administrative judge and held that the agency's deciding official can consider lesser-included offenses. The Board reasoned that the administrative judge had erred because *Burroughs* did not suggest that the agency could not split its own charge.[32] The Board did not, however, attempt to draw a reasoned distinction between consideration of lesser offenses by a deciding official and such consideration by one of the Board's administrative judges.

In my view, no valid distinction exists. The Board should be permitted to sustain a lesser offense if the appellant is on adequate notice of all the elements of the lesser charge. Obviously, it would be inherently unfair to allow the Board to sustain a charge that was never alleged.[33] In that situation, the employee would not have known what he or she was expected to defend against. In contrast, consideration of lesser offenses is not unfair when the employee has been apprised of the elements she must defend against.

I see no basis for the insistence of the Board and Federal Circuit that review of an agency disciplinary action be limited to the "four corners" of the agency's original charges. While the Board and practitioners certainly refer to Board appeals as an appeal from a particular "agency action," the Board conducts a *de novo* review of the factual and legal questions presented by such an action. As one of the Board's first decisions noted:

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[30]55 M.S.P.R. 569, 576 (1992).

[31]*Id.*

[32]*Id.*

[33]Moreover, the Board will not sustain an agency action based on charges that an agency could have properly brought, but did not. Nazelrod v. Department of Justice, 50 M.S.P.R. 456, 459-61 (1991), *aff'd* sub nom., King v. Nazelrod, 43 F.3d 664 (Fed. Cir. 1994).

> It is the Board's decision, not the agency's, that constitutes an "adjudication" (5 U.S.C. § 1205(a)(1)) which must be articulated in a reasoned opinion providing an adequate basis for review by a Court of Appeals. . . . The mere fact that the agency's decision is appealable to the Board does not limit the Board's scope of review to that of an appellate court.[34]

Thus, if disciplining an employee for misconduct promotes the efficiency of the service, the Board should be able to affirm such discipline notwithstanding that the misconduct was a lesser offense to that imposed by the agency, provided, as stated previously, that the employee concerned was on adequate notice of the misconduct at issue.

Allowing consideration of lesser offenses also saves scarce government resources. Under current practice, if an agency erroneously charges an employee, it loses the case on technical grounds. To guard against losing on a technicality, some agencies conduct lengthy investigations and develop a comprehensive record before even proposing disciplinary action. In other words, the accused employee gets two hearings: one in front of the agency and another in front of the Board.[35]

This practice makes little sense. Appellants should certainly have their "day in court," but not twice. Nor should an agency that unsuccessfully pursued a greater charge be forced to reinstate an employee guilty of a lesser offense, just to later remove that employee. Furthermore, an agency should not be forced to give up, leaving in place in the federal work force an employee likely to have committed serious misconduct. These results do not promote justice. Rather, it only serves to reinforce the type of legalistic machination that holds the civil service's legal system out for public ridicule and leads to the perception that it is impossible to fire civil servants.

Congress can correct this situation by amending Title V to legislatively overrule Board and Federal Circuit decisions that preclude consideration of lesser-included offenses. Failing that, I believe that the OPM can accomplish the same result by regulatory change. Chapter 75 of Title V authorizes the OPM to prescribe regulations to carry out the purposes of the legislation,[36] one of which is to remove

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[34] Parker v. Defense Logistics Agency, 1 M.S.P.R. 505-18 (1980).

[35] An agency may provide an employee a hearing in place of, or in addition to, a written and oral reply. 5 U.S.C. § 7513(c). See also 5 C.F.R. § 752.404(g). Most agencies do not afford employees these additional procedures.

[36] 35 U.S.C. § 7514 (1995).

or suspend employees for such cause as will promote the efficiency of the service.[37]

IV. Develop Summary Judgment Procedures

In federal civil practice, growing concern over cost and delay in civil litigation has focused increased attention on summary judgment procedures as a vehicle to implement the just, speedy, and inexpensive resolution of litigation.[38] Title V gives an appellant a statutory right to a hearing before the Board.[39] Like civil practice generally, a certain percentage of cases brought before the Board are frivolous or do not involve material issues of fact. Unlike the federal courts and other legal systems, however, the Board has no mechanism to dispose of these frivolous cases or of cases that do not present material issues of fact.

In *Crispin v. Department of Commerce*,[40] the Federal Circuit held, after looking at the legislative history of the Civil Service Reform Act, that the Board cannot dismiss an appeal based on summary judgment procedures. The Federal Circuit relied heavily on legislative history. The Senate bill contained a summary judgment procedure while the House bill did not, and the conference adopted the House version.[41]

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[37] *Id.* § 7513.

[38] William W. Schwarzer, et al., *The Analysis and Decision of* ***Summary*** *Judgment Motions, A Monograph on* ***Rule 56*** *of the* ***Federal Rules*** *of Civil* ***Procedure,*** 139 F.R.D. 441, 445 (1992).

[39] 5 U.S.C. § 7701(a)(1) (1995).

[40] 732 F.2d 919, 922 (Fed. Cir. 1984).

[41] *Id.* The conference committee report which accompanied the Civil Service Reform Act is as follows:

> APPEALS TO THE MERIT SYSTEMS PROTECTION BOARD
> RIGHT TO A HEARING
>
> The SENATE BILL provides that an employee is entitled to an evidentiary hearing before the Merit Systems Protection Board unless a motion for summary decision is granted. A motion for summary decision shall be granted if the presiding officer decides that there are no genuine and material issues of fact in dispute. The presiding officer may provide for discovery and oral representation of views, at the request of either party, in connection with a summary decision.
>
> The House amendment contains no provision for summary decision. It provides that an employee has a right to a hearing before the MSPB for which a transcript will be kept and the right to be represented by an attorney or other representative.
>
> The conference substitute in section 7701(a) adopts the House provision so that the employee is entitled to a hearing on appeal to the Merit Systems Protection Board. The hearing may be waived by the employee.

While I will not quarrel with the Federal Circuit's reading of the legislative history of the Act, in subsequent cases the Federal Circuit has restrictively interpreted an appellant's statutory right to a hearing. **An** administrative judge may, for example, deny an appellant a hearing as a sanction for failure to respond to an order to file prehearing submissions.[42] Additionally, an administrative judge need not conduct a hearing on a threshold jurisdictional issue when no material issues of fact exist.[43]

Congress should amend Title V to afford summary judgment procedures in Board practice modeled after Federal Rule of Civil Procedure 56.[44] A hearing where there are no material issues of fact is an expensive exercise for federal agencies that provides no societal benefit. However well intended Congress's desire to afford every appellant a hearing might have been, hearings with no material issues of fact are little more than a cruel hoax on the appellants. These hearings only raise the appellants' hopes, but cannot possibly affect the outcome of their cases. Furthermore, it is a waste of money in a time when governmental resources are increasingly scarce.

Some may argue that the statutory right to a hearing demonstrates the importance that Congress places on the rights of federal employees and affords disciplined federal employees an important venting process. Still, summary judgments are commonplace in United States District Court and routinely concern matters of the utmost consequence to both litigants and society, such as litigation under Title VII of the Civil Rights Act.[45] While commentators have severely criticized the frequent use of summary judgment,[46] I believe that neither the Board nor federal agencies should continue

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Id. (citing H.R. REP. NO. 95-1717, 95th Congr., 2d Sess. 137 (1978), ***reprinted in*** 1978 U.S.C.C.A.N. 2723,2871).

[42]***See*** Ahlberg v. Department of Health and Human Services, 804 F.2d 1238, 1243 (Fed. Cir. 1986).

[43]***See*** Manning v. Merit Systems Protection Board, 742 F.2d 1424, 1427-28 (Fed. Cir. 1984).

[44]In federal civil cases, the court may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)). When deciding a motion for summary judgment, the court may not weigh the evidence to determine the truth of the matter, but simply must determine whether there is an issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,249 (1986).

[45]42 U.S.C. §§ 2000e-17 (1994).

[46]***See generally*** Ann C. McGinley, ***Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases,*** 34 B.C.L. REV. 203 (1993).

to be burdened with conducting wasteful, unnecessary hearings in clearly frivolous appeals or cases which present no material issues of fact. Indeed, in *Arnett v. Kennedy*,[47] the Supreme Court has held that, while a federal employee has a property interest in his or her employment and must receive due process before termination, due process does not necessarily require a full evidentiary hearing. There is enough meritorious litigation to go around in American society without a hollow review of a meritless challenge to a personnel action.

V. Excuse an Employee's Delay Due to Selection of the Incorrect Forum

Depending on the circumstances, an employee who has been disciplined might be entitled to seek relief in any number of forums. While these numerous avenues of redress might appear benevolent, the employee must choose where he or she files with great care. As seen in Hypothetical Two, an employee with a meritorious claim who picks the wrong forum to seek redress might get no relief at all. Indeed, the general rule in MSPB practice is that an employee's decision to seek redress in other forums does not excuse a late filing with the Board.[48]

An appeal to the Board must be filed within thirty days after the effective date of the action being appealed.49 If an appeal is late, the Board will waive the untimely filing only where the appellant shows good cause[50] for the late filing.[51]

Many employees file late, however, because they sought redress elsewhere. Presently, the Board does not care, and has consistently declined to find good cause when the appellant has sought redress in other forums. The Board has dismissed appeals as untimely where

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[47]94 S. Ct. 1633, 1645-46 (1974).

[48]Shimmin v. Department of Justice, 63 M.S.P.R. 435, 438 (1994).

[49]*See supra* note 10.

[50]To establish good cause for a late filing such that a waiver of the filing deadline should be granted, the appellant must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case or that she was prevented from filing the appeal in a timely fashion due to circumstances beyond her control. See Alonzo v. Department of the Air Force, 4 M.S.P.R. 180, 184 (1980). In recent years, the Board has liberally interpreted "good cause." *See, e.g.*, Ward v. Department of Veterans Affairs, 67 M.S.P.R. 482 (1985) (60-day delay excused); Murroughs v. Office of Personnel Mgt., 67 M.S.P.R. 115 (1995) (stating the only test for good cause is a "reasonable excuse" and any doubts must be resolved in favor of the employee).

[51]5 C.F.R. §§ 1201.12, 1201.22(c). The appellant bears the burden of proof on the timeliness issue by preponderant evidence. *Id.* § 1201.56(a)(2).

the employee previously had sought redress by: (1) seeking assistance from members of Congress;[52] (2) filing a civil action in United States District Court;[53] (3) filing a disability retirement application with the OPM;[54] and (4) filing a grievance.[55]

I see no rational basis for the Board's harsh stance. After all, the Equal Employment Opportunity Commission's regulations allow an employee to pursue an otherwise untimely EEO complaint[56] if the employee had mistakenly appealed to the Board a case over which the Board lacked jurisdiction.57 Why can't the Board adopt as flexible a position, given the tremendous complexity of the currently system? It can. The Board recently amended its regulations to increase the time limits for filing an appeal from twenty to thirty days58 and it could easily adopt a regulation that allows administrative judges to waive untimely filed appeals where the appellant used due diligence in seeking redress elsewhere. The due diligence standard would protect the agencies from having to defend against old appeals where appellants have sat on their rights, while protecting those appellants who have sought redress of their grievances from having their claims dismissed because they were confused as to the proper forum in which to proceed.

VI. Conclusion

A simpler, less legalistic approach to employee discipline ultimately helps both sides. Neither agencies nor employees should win appeals on technicalities, but cases should be decided on their merits. Simplifying the civil service disciplinary system is in the public interest. American taxpayers deserve competent employees and federal agencies must be equipped to separate those employees who are

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[52] Waldon v. Department of the Army, 63 M.S.P.R. 478,479 (1994).

[53] Carney v. Veterans Administration, 51 M.S.P.R. 314, 315-16 (1991), *aff'd*, 976 F.2d 747 (Fed. Cir. 1992) (Table), *cert. denied,* 113 S. Ct. 999 (1993).

[54] Davis v. Department of the Army, 9 M.S.P.R. 215,216-17 (1981).

[55] Motin v. United States Postal Service, 42 M.S.P.R. 282,285 (1988).

[56] To timely file an EEO complaint, an employee must generally seek EEO counseling within 45 days of the date of the matter alleged to be discriminatory. 29 C.F.R. § 1614.105(a)(1).

[57] *Id.* § 1614.302(a)(2) states:

> If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint. . . .

[58] Effective June 17, 1994, the time for filing an appeal to the Board was increased from 20 days to 30 days following the effective date of the action being appealed. *See* 59 Fed. Reg. 31,109 (1994) (codified at 5 C.F.R. § 1201.22(b) (1995)).

not. The changes I propose accomplish that result, while not deviating one iota from the principle that employees threatened with discipline receive **fair** notice of the charges against them, and a full and fair opportunity to defend against those charges.

WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK*

REVIEWED BY MAJOR ELIZABETH DIVECCHIO BERRIGAN**

Organized Labor. Have you ever wondered what exactly that phrase means? Does it still exist in the 1990s? And even if it does, should it? Organized Labor. The Mineworkers, the United Steel Workers of America, the Brotherhood of Teamsters, the United Auto Workers. These are the "big guns" that make up organized labor; with their noble causes and their dwindling memberships. In today's environment of closed mills, small businesses, and union decertifications, why would any lawyer ever want to become a labor lawyer and represent organized labor? In *Which Side Are You On?*, author Thomas Geoghegan attempts to answer this question, not only for the reader but also for himself.

Mr. Geoghegan is a graduate of Harvard College and Harvard Law School. His involvement in the labor movement began in 1972. His segue from college student to organized labor was not based upon any romantic, passionate moment in time when he realized this was a cause that called to him. Instead, Mr. Geoghegan's journey into the world of labor began, probably in the same way that most journeys begin, because of a soured romance. His roommates convinced him that instead of sulking over a love lost, he should drive to Pennsylvania for the weekend with them and be an observer in a mineworker's election.

This mineworker's election turned out to be the result of a prominent national story in 1972. This particular election was a rerun of the 1969 mineworker's election. The reason for the rerun was that the elected president of the 1969 election, Mr. Tony Boyle, allegedly ordered the murders of his opponent, Mr. Jock Yablonski, and his wife and daughter.

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*THOMAS GEOCHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK (New York: The Penguin Group 1992); 287 pages, $11.00 (softcover).

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The murders came after the 1969 election, an election that Mr. Boyle won, but which Mr. Yablonski attempted to protest. After Mr. Yablonski's murder, a group of rank-and-file miners formed a group called Miners for Democracy (MFD) which persuaded the Labor Department to file suit and overturn the 1969 election results. In November 1972, the new election began and Mr. Geoghegan, with heavy heart, went to Sheridan, Pennsylvania, to be an observer for the MFD.

It was during the few short days in Sheridan that Mr. Geoghegan developed a love-hate relationship with organized labor, As he spoke to the miners who came to vote, poor old men accompanied by their old tiny wives, he began to understand the passion that consumed these people. Or more accurately stated, he began to appreciate the hate that they held for Tony Boyle! Because Sheridan and other small communities had so few workers (i.e., few votes), Mr. Boyle paid little attention to them. Consequently, after thirty years of working in the mines, the miners and their families in these areas were made to subsist on a pension of approximately thirty dollars a month (a pension which Mr. Boyle negotiated).

Mr. Geoghegan writes that what affected him the most was not the miners, but rather, their wives. He writes, "I was affected by the way they wanted revenge, a terrible Ukrainian blood revenge on everyone, revenge on the companies, revenge on Boyle, even revenge on the Union, for having left them there to die, on $30 a month." This began Mr. Geoghegan's odyssey into organized labor; an odyssey borne out of a small group of mineworkers in a small town in Pennsylvania, their quest for justice and their feisty wives.

The best way to describe Mr. Geoghegan's book is that you feel as though you are reading someone's diary, replete with anecdotes. And it is through these different experiences that the author becomes intrigued with the labor movement.

In the early chapters, his writing initially appeared disjointed. Mr. Geoghegan would begin a thought and, without really completing it, seemed to go off on a tangent. Yet, moving past the initial chapters it becomes evident that Mr. Geoghegan has written his book in such a way that it is as if he is sitting across the table from you, engaging you in conversation. He seems to answer the reader's questions as his story moves from page to page, episode to episode.

Mr. Geoghegan chronicles the labor movement's history, its boom during the 1960s and 1970s and its demise during the 1980s. He discusses his career that began as a staff attorney for the United Mineworkers (UMW) at the UMW headquarters in Washington, D.C. He then moved to Chicago, where he still practices. He has

represented a variety of union locals of the United Steelworkers, the Brotherhood of Teamsters, and the Brotherhood of Carpenters.

Throughout his practice, Mr. Geoghegan is never really comfortable with being a labor lawyer. He discusses in the book his internal conflict of being a member of the upwardly mobile while the seamy world of organized labor calls to him. He writes that:

> I live near Lincoln Park, on the North Side of Chicago. I eat pasta, I jog, I do all that is required of me, and I pass like anyone else. I could pass as a management lawyer.
>
> But I am not: I do not know what I am. I belong to another world, too. It is the anti-world. The black, sulfurous, White Sox anti-world. The South Side. The secret world of organized labor.

Mr. Geoghegan captivates the reader with this sense of humor and delivers one humorous account after another vividly depicting his life with the union and its members.

A majority of his book deals with the 1980s, a time when labor began to decline. **As** a result, Mr. Geoghegan recounts tales that often concern frustrated union members who were denied their pensions because of a company's bankruptcy, or disgruntled members who felt abandoned by their own unions. Mr. Geoghegan describes these emotionally charged topics in such a way that the reader cannot help feeling sorry for these workers. Yet, the reader undoubtedly will smile or chuckle uncontrollably at the humor Mr. Geoghegan tactfully injects into these disheartening situations.

One of the stories that Mr. Geoghegan recounts concerns a United Brotherhood of Carpenter's local that he represented. In 1986, the International Union placed the Northwest Indiana District Council (NIDC) (composed of five local unions) into trusteeship. **A** trusteeship occurs when a lower or subordinate body such as a district council temporarily loses the right of self-government. During trusteeship, the union members cannot vote and the International Union makes all the decisions.

Once the International Union placed the NIDC in trusteeship, it doubled the council's assessment, a form of dues, from two to four percent of the members' income. It removed the elected officers and placed a new man, Joe Manley, in charge. Joe Manley, in turn, appointed the business agents for the locals. The end result was that the International Union controlled the locals, and their members had little or no input.

Shortly thereafter at a meeting, Willie Shepperson, a former member of the International Union staff, began to detail for the local union members how the International Union had taken over all the local and district councils. Apparently, the International Union had lost over $95 million of its general fund in bad investments and assumed control of the local unions to increase the assessments to build revenue. The officers of the International Union knew that their bad investments and loss of the general fund's money would most certainly play against them in the upcoming 1991 convention. Consequently, to avoid being thrown out of office, they stripped the members of their voting rights and appointed a "trustee," — such as Mr. Manley — at each council who, in turn, appointed the business agents who held the voting rights.

At this same meeting, after Mr. Shepperson spoke, Mr. Manley attempted to address the members but was unable to justify the International Union's activities. Mr. Geoghegan describes the following humorous and compelling exchange between one of the members and Mr. Manley as Mr. Manley addressed the group:

> [Manley] says, almost begging, "Look, you tell me who you want as your business agent, and I'll appoint them."
>
> Harsh laughter.
>
> Five rows in back of me, a millwright stands up. He walks halfway to the front, and says, in a shaky voice, "Joe Manley."
>
> Manley looks at him.
>
> "Joe Manley," he says again.
>
> 'What?"
>
> "Do you know what Thomas Jefferson stands for?" (Now, the man is not drunk, although he's clearly had a beer or two).
>
> Manley says, "Uh . . . I don't get your question."
>
> The member says again, slowly, "Do you know what Thomas Jefferson stands for?"
>
> Manley thinks about it. "No."
>
> 'Well, Thomas Jefferson . . . stands for all men are created equal . . . and for liberty . . . and for . . . and for . . . NOT FUCKING THE PEOPLE."
>
> Everyone cheers.

On reading this passage, the reader does not know what to do first, laugh out loud or stand up and cheer!

The most inviting aspect of *Which Side Are You On?* is that it is a realistic account of labor unions, yesterday and today. A reader unfamiliar with unions and their members may read the book and think that Mr. Geoghegan embellishes his stories. However, I can attest that this is not the case. There is no exaggeration in his stories.

I grew up in Pittsburgh, Pennsylvania, the "Steel Town." My dad was a member of the United Steelworkers of America from 1947 until he retired in 1994. He started out working in the steelmills. In 1969, he became a staff representative for his local. He ultimately became a subdirector of a district.

With this background, I was able to relate to the stories contained in Mr. Geoghegan's book. My family and I lived through many of the same experiences. His writing is so vivid that, when I read about his first experiences with the labor movement, he transported me back in time to when I was eight years old and everyone was talking about Jock Yablonski's murder. (Pittsburgh is in Allegheny County and borders Washington County which is where the murders occurred). It was astonishing to me that someone outside of Pennsylvania, not a member of the United Mineworkers Union, knew about this "local"murder.

His accounts of the rise and fall of the labor movement also impressed me. His writing seemed to ask the same questions and reflect the same fears of those who lived through the rise and the downward spiral of the unions. Readers who have a connection with the labor movement will undoubtedly empathize with the people Mr. Geoghegan writes about—those who have lost their jobs, their pensions, and their ability to survive. Everything and anything that these people ever knew was taken away from them; sometimes overnight.

Mr. Geoghegan is, without a doubt, a good storyteller. He gives all of my father's friends—who still come to my parent's home and sit on the front porch during the spring and summer and talk about the "good old days"—a run for their money. What makes his book special is the constant struggle that he faces—a yuppie lawyer, who eats at all the right places and goes to all the right parties, but who just cannot seem to escape his own idealism and liberalism. He believes in the individual and the right to vote and this is what compels him to represent the union members.

Recently, I found an old clipping from a 1969 United Steelworkers of America newspaper that recounted an interview of my

dad. The article discussed what the union means to people. One of the issues that my dad discussed was the "younger generation." He said that "they don't know why unions were started. Times have been so good they don't know the history of what unions have done to eliminate the horrible conditions that existed at one time in the open shop—workers had no rights and getting a job and holding onto it was a matter of partiality, religion and nationality."

*Which **Side Are** You **On?*** attempts to inform the younger generation not only about the hows and whys of the union's beginnings, but, also what happened to the unions of today. Through his effective use of humor and humility, Mr. Geoghegan both informs and delights the reader about a subject that can be frustrating and hopeless.

Anyone who has a connection with organized labor will want to read this book and remember, sometimes pensively and other times jovially, the good, and the not so good, old days. For readers without the benefit of growing up in a blue-collar neighborhood, this book is a must. Mr. Geoghegan will take you on a journey that you will not soon forget. You will easily understand why ***Which Side Are** You **On?*** becomes a question for which we all do not have an exact answer.

THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE*

REVIEWED BY **CAPTAIN** HOLLY O'GRADY **COOK****

In January 1989, Eileen Franklin sat in her family room with her two-year old son in her arms and her six-year old daughter on the floor playing with friends. Eileen's daughter asked her mother a simple question. When Eileen looked at her daughter to answer the question, Eileen suddenly remembered that she saw her father, George Franklin, brutally rape and murder her eight-year old best friend twenty years earlier. What triggered Eileen's flashbacks of this rape and murder after two decades? How detailed was her memory? How reliable was it? What evidence existed to corroborate her memory? Is corroborating evidence necessary? These are some of the perplexing questions raised about repressed memories in the book, The Myth *of* Repressed Memory: False Memories and Allegations *of* Sexual *Abuse.*[1]

Renowned research psychologist and memory expert, Dr. Elizabeth Loftus, and writer, Katherine Ketcham, cleverly use cases like Eileen Franklin's to enlighten the public on what repressed memories are and how therapy can influence them. According to Dr. Loftus, people who believe in the concept of repression have faith in the mind's ability to defend itself from emotionally overwhelming events by removing certain experiences and emotions from conscious awareness. Months, years, or even decades later, when the mind is better able to cope, the mind dredges these "repressed memories" up piece by piece from their murky grave.

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*ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY: FALSE MEMORIES AND ALLEGATIONS OF SEXUAL ABUSE (St. Martins Press 1994); 283 pages, $22.95 (hardcover).

**Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1] Dr. Loftus and Ms. Ketcham also wrote WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT **WHO PUT** MEMORY ON TRIAL (St. Martin's Press 1991). ***See*** Fred L. Borch, ***Witness*** for ***the Defense,*** 134 MIL. L. REV. 243 (1991) (**book** review). Additionally, Dr. Loftus has written numerous other **books** and articles on memory and eyewitness testimony. She has testified in hundreds of court cases and delivered speeches on memory and eyewitness testimony all over the country, including a lecture at The Judge Advocate General's School, United States Army, Charlottesville, Virginia, in August of 1991. ***See Eyewitness Testimony,*** pts. I & II, JA-91-0083C (videotape produced by the Visual Information Branch, The Judge Advocate General's School, United States Army).

Dr. Loftus is a skeptic of the theory of repressed memories. She does not dispute the memories of people who have lived for years with dark secrets and only find the courage to discuss them in the supportive environment of therapy. People can push those memories out of their mind, but they do not forget them. Dr. Loftus only questions the memories commonly referred to as "repressed"—memories that did not exist until someone went looking for them. She, along with other skeptics, look at the malleability of memory and ask for evidence and corroboration that a person can consciously repress their memories until the mind is able to cope. Without such proof, she asks, how can anyone be certain that these long-lost memories represent fact and not fiction?

Dr. Loftus describes memory as a reconstructive process in which a person can add new details thereby changing the quality of the memory. Therapists must be sensitive to this reconstructive process and to the fact that they can bring their own biases into the therapeutic environment. If they are not, therapists can unintentionally contaminate the therapeutic environment and the memories of their patients. Dr. Loftus maintains that she is not trying to attack therapy by making these observations. She is merely trying to expose the weaknesses of therapy and to suggest ways to improve it.

Many of the cases discussed in the book started when a female adult walked into a therapist's office looking for help for specific problems (for example, eating disorders, depression, nightmares, relationship problems). Initially, the patient had no thoughts of abuse. The therapist suggested that something in the patient's childhood might be responsible for the current problems and helped the patient to search her background for the root of the problems. If the patient claimed that she could not find anything, the therapist told her that she did not dig deep enough. If the therapist asked the patient if someone had abused her and the patient said no, the therapist told the patient that she was in denial and should keep looking in that direction. Gradually, the patient found repressed memories of child sexual abuse.

Therapists use specific techniques like suggestive questioning, dream work, journal writing, hypnosis, and group therapy to help patients search their background for the root of their problems. Through these techniques, therapists can unknowingly implant memories in the minds of highly impressionable individuals who are looking for answers to their problems. Once these individual find the answers in their memories, they may not be able to distinguish between their fabricated memories and their true memories. Eileen Franklin's case illustrates these concerns.

What triggered Eileen's flashbacks? That depends on who you ask. Eileen reported that she remembered the murder while she sat with her children in January 1989. However, Eileen's brother said Eileen confided to him that she had visualized the murder while she was in therapy and under hypnosis. Later, Eileen changed her story about being hypnotized and asked him to confirm that the memory had come back to her in a regular therapy session. Eileen's sister testified that Eileen told her that the memory returned in a dream shortly after Eileen went into therapy.

How detailed was Eileen's memory? How reliable was it? When Eileen told her story to detectives in November 1989, she remembered specific details and word-for-word conversations. Three days later, the detectives arrested her father for the murder. Eileen's repressed memory from when she was eight years old became the only evidence against her father. At the preliminary hearing six months after the arrest, Eileen's account of the murder had numerous additions and subtractions. Dr. Loftus, who the defense called as an expert witness, claims that the changes in Eileen's story confirm what researchers already know about the malleability of memory. "Over time, memory changes, and the more time passes, the more changes and distortions one can expect. As new events intervene, the mind incorporates the additional facts and details, and the original memory gradually metamorphoses." [2]

The changes in Eileen's memory during those six months were perfectly normal to Dr. Loftus. But how much did Eileen's memory change during the twenty-year period of alleged repression? How much did Eileen actually remember and how much did she incorporate after conversations, newspaper reports, and television reports of the murder? Everything Eileen told the detectives matched the information printed in newspapers, even the information Eileen added and subtracted before the preliminary hearing. At the trial, she did not provide any new information. Dr. Loftus and other defense experts told the jury that memory fades with time and loses accuracy. However, despite this expert testimony and the lack of corroborating evidence, the jury convicted George Franklin of first-degree murder.[3]

Eileen Franklin and other individuals recalling repressed memories clearly believe their new-found memories. But what if these individuals derive their memories not from facts, but from dreams, fears, or desires? What if there is no way to prove that the

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[2] LOFTUS, *supra* note *, at 46.

[3] The *Franklin* case was the first time repressed memory was used in a criminal prosecution.

memories are true? These allegations can destroy not only the individuals making them, but also their families and the individuals accused of the abuse.

The authors use actual cases to paint a sympathetic picture of how difficult it is for those accused to understand why the allegations are made and to prove that nothing happened. The authors mention that when patients reveal their memories in therapy, therapists encourage them to accept the memories as real. If anyone asks the patients to prove the abuse, supporters of the theory of repressed memories frequently say that patients are not responsible for proving that someone abused them and demands for proof are unreasonable. One therapist believes that the memories themselves are proof enough.[4] Another believes that if months or years later patients discover that they were wrong about the details, they always can apologize and set the record straight.[5] Unfortunately, as the authors convincingly demonstrate through examples, the harm occurs once the patient accuses someone and it usually cannot be corrected. George Franklin's conviction illustrates this point.

George Franklin has been in jail since the conclusion of his 1990 murder trial. In 1995, a United States district court judge reversed the conviction against him concluding that "the risk of an unreliable outcome in this trial is unacceptable."[6] As of December 1995, prosecutors still were deciding whether to retry Mr. Franklin. *The Los Angeles Times* quoted the prosecutor who originally tried the case as saying, "Let's be honest, in the five years since the conviction, there is a whole lot more skepticism about repressed memory."[7] If the prosecution does not retry him, George Franklin will be released after serving more than five years of his sentence—but his life will never be the same.

Dr. Loftus's background as a researcher and expert on the workings of memory is critical for the discussion of repressed memories. Most of these memories involve some type of child sexual abuse, but the debate is not about the reality or horror of child abuse. The debate is about memory. Dr. Loftus has conducted hundreds of memory-related experiments with thousands of subjects.

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[4] LOFTUS, *supra* note *, at 218 (citing a conversation with Ellen Bass, author of a book frequently read by abuse victims). *See* ELLEN BASS & LAURA DAVIS, THE COURAGE TO HEAL: A GUIDE FOR WOMEN SURVIVORS OF CHILD SEXUAL ABUSE (Harper & Rowe 1988).

[5] LOFTUS, *supra* note *, at 172 (citing RENEE FREDRICKSON, REPRESSED MEMORIES: A JOURNEY TO RECOVERY FROM SEXUAL ABUSE (Simon and Schuster 1992).

[6] Dan Morain, ***Recovered-Memory Murder Case Unravels,*** L.A. TIMES, Dec. 25, 1995, at A-1.

[7] *Id.*

She has molded people's memories, prompted them to recall nonexistent items, and even implanted false memories in people's minds, making them believe in events that never happened. All of her experiments prove that memory is malleable and susceptible to suggestion. Accordingly, uncorroborated memories that suddenly exist after someone suggests them makes those memories highly questionable.

Despite their admitted skepticism in the theory of repressed memories, the authors strive to present the issues surrounding these memories in an objective way. They conducted hundreds of interviews with accusers and accused, therapists, lawyers, psychologists, psychiatrists, sociologists, criminologists, and law enforcement personnel. They also researched numerous books and articles on the subjects of memory, trauma, therapy, and recovery. The result is a well-written book that provides an excellent and balanced overview of the debate between the skeptics and the supporters of the theory of repressed memories.

The book is divided into thirteen chapters. Seven chapters explain specific cases involving repressed memories and the results of each case. The authors alternate the other six chapters between the case studies in an effort to elaborate on (1) memory in general; (2) techniques for recovering repressed memories; (3) arguments made by both sides in the repressed memory debate; and (4) concerns about therapy. The authors identify numerous references both in the body of the book and in a separate section at the end of the book. As a result, this book is an invaluable reference tool for any attorney faced with a case involving repressed memories. Although somewhat scientific and very detailed, the logical use of stories to explain fully the concept of repressed memory makes the book easy to read for any person interested in how memory works.

While ***The Myth of Repressed Memories*** presents a good overview of whether unsupported repressed memories are credible, it clearly concludes that there should be evidence to corroborate these "found" memories. Otherwise, no way exists to determine the veracity of the new-found memories and avoid the heartache caused by false memories and false allegations. Most of the people in the book accused of abuse adamantly maintain that they are innocent and that the recovered memories are false. Some accused do not believe that their family members would lie; therefore, they claim that they do not remember abusing anyone. The authors do not cite any cases involving repressed memories, corroborated or uncorroborated, where someone admitted their guilt.

Several reviews done on *The Myth of Repressed Memory* have been very favorable.[8] However, one review raised concerns that this book and others like it "will once again silence women and men from speaking—and being believed—about very real abuse, and will create a new breed of experts who will once again presume to know the truth."[9] This same review also pointed out that Dr. Loftus did not reference a scientific study that she copublished in 1994. "[I]n the study, which would appear to contradict the title of her own book, more than half of the 105 women questioned at a substance abuse center reported having been sexually abused as children, and almost a fifth of that group reported a period of total forgetting, after which their memories returned."[10] There are also other studies involving repressed memories not cited in the book, including one released after its publication, that Dr. Loftus says "shows that sexual abuse experiences that happened at a young age can be forgotten."" While the absence of any reference to these studies is worth noting, it does not affect the overall utility or purpose of the book. Repressed memories are still the subject of extensive debate and a thorough grasp of the issues involved is critical to participating in or understanding the arguments made on both sides.

The theory of repressed memories is gaining increased attention not only in the scientific community, but also in the legal community. States are changmg their statute of limitations to accommodate these cases.[12] Prosecutors are charging people based on repressed memories, and at least one defense counsel has raised the issue in a military court-martial.[13] Additionally, plaintiffs are rais-

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[8] *See* Nancy Seideman, *Victims of Memory,* ATLANTA J. AND CONST., June 11, 1995, at 13M; Steven Rose, *Two Types of Truth*, N.Y. TIMES, Feb. 26, 1995, sect. 7, at 20; Anthony Storr, *The Myth of Repressed Memory & Making Monsters,* INT'L HERALD TRIB., Jan. 23, 1995, news section; Mark Sauer, *Repressed Memory Deconstructed as Quackery with a Heavy Price,* SAN DIEGO UNION-TRIB., Dec. 18, 1994, at Books-4.

[9] Katy Butler, *Did Daddy Really Do If?*, L.A. TIMES, Feb. 5, 1995, book review, at 1.

[10] *Id.*

[11] Alison Bass, *New Study Indicates Memories of Abuse Can be Suppressed,* HOUSTON CHRONICLE, Jan. 28, 1995, at A-17. *See also* Joy Lazo, *True or False: Expert Testimony on Repressed Memory,* 28 LOY. L.A. L. REV. 1345 (1995); Leila Kulpas, *Group Takes Fight to Psychotherapists: Are Psychiatrists Unable to Unlock Long-Buried Memories of Child Abuse from Their Patients, or Is the Concept of Repressed Memory a Hoax?,* VANCOUVER SUN, Apr. 1, 1995, at D13.

**Rosemarie Ferrante, *The Discovery Rule: Allowing Adult Survivors of Childhood Sexual Abuse the Opportunity for Redress,* 61 BROOK. L. REV. 199 (1995).

[13] United States v. Cox, 42 M.J. 647 (A.F. Ct. Crim. App. 1995). In *Cox,* a defense counsel asked the court to permit individual voir dire of a court member who became visibly upset during the testimony of a victim of child sexual abuse. Defense counsel wanted to ask the member whether her crying indicated that she already had made up her mind about guilt and whether the testimony had somehow "triggered" a previously repressed memory of sexual abuse that she had not disclosed on initial voir dire. *Id.* at 654. The military judge denied the motion and the appellate court affirmed. *Id.*

ing the issue in civil suits against therapists and hospitals where parents and former patients allege that the therapists coaxed the patients to remember memories of sexual abuse that may or may not have occurred.[14] Those who find themselves involved in any part of a repressed memory case will want to read ***The Myth of Repressed Memory.*** That is the fastest and easiest way to become thoroughly familiar with the conflicting expert opinions and interesting studies surrounding the issue.

[14]So far, at least three civil cases have resulted in plaintiffs' awards ranging from $272,000 to $500,000. Thom Weidlich, ***"False" Memory, Big Award,*** NAT'L L.J., Jan. 9, 1995, at **A6.**

THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY*

REVIEWED BY J THOMAS PARKER**

Lawyers, it has been suggested, were the leading social scientists of the Middle Ages.[1] In modern times, it seems that the growing number of talk show hosts have staked out that territory. Although he does not claim to be working as either a social or political scientist, in ***The Abuse Excuse,*** Alan M. Dershowitz takes aim at the current misuse of legal concepts, such as mitigation and justification, in an effort to regain some of the ground that the pop theorists and their kin have seized.

"The abuse excuse" is really a catchy phrase for a whole host of recently spawned syndromes, perceptions, defenses, and excuses. In essence, an "abuse excuse'' is more narrowly recognized as "the legal tactic by which criminal defendants claim a history of abuse as an excuse for violent retaliation."[2] In its purest form, the abuse excuse manifests itself when, with any transgression, there is an accompanying retort (supposedly good reason) that responsibility should not rest squarely on the shoulders of the wrongdoer. In other words, to offer up an abuse excuse is to seek to blame someone else or some set of circumstances for one's own crimes or other problems.

Before examining the particulars of this idea, it is helpful to examine certain fundamental notions about criminal defense. Dershowitz finds that our legal system has traditionally recognized three general groups of excuses. First, there are those excuses that amount to absolute defenses or justifications such as the defense of self-defense. As the author reminds us, "The law prefers the life of the defender to that of the aggressor."[3] These defenses or excuses

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*ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY (Boston: Little, Brown & Co. 1994); 341 pages (hardcover).

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[1]MULFORD Q. SIBLEY, POLITICAL IDEAS AND IDEOLOGIES: A HISTORY OF POLITICAL THOUGHT **205** (1970).

[2]DERSHOWITZ, ***supra*** note *, at 3.

[3]*Id.* at 9.

justify otherwise aberrant conduct both legally and morally. Next, there are those excuses that extenuate. Accidental killings fall into this category and, while the actor may be morally culpable, he is not usually held to be criminally responsible. Finally, there are mitigating excuses. Here, a full investigation into the circumstances will indicate that the actor's conduct is blameworthy but to a lesser extent. By example, this category of excuse may work to bring in a conviction for manslaughter rather than one for murder. This type of excuse also may result in less severe punishment.[4]

Abuse excuses are the illegitimate offspring of these recognized, traditional concepts and they carry the lineage to an extreme. In illustrating this premise, Dershowitz risks being branded as politically incorrect because he chooses the battered woman syndrome as one of his favorite topical ideas with which to take issue.[5] Perhaps a more fundamental criticism would be that while he seems to doubt the efficacy of the battered woman syndrome, he does not describe its elements in any great detail.[6] Regardless, the relative merit of the battered woman syndrome is not what Dershowitz focuses on. Instead, his attention is limited to how the battered woman syndrome has been used in court.

In the courtroom, Dershowitz finds that certain female victims of spousal abuse have successfully countered charges of assault and even murder.[7] In these cases, the basis of the defense claim is that the defendants should be acquitted for their own acts of violence against their chief abusers because of the prior assaults to which they have been subjected.

To best understand Dershowitz's ultimate concern with this defense, the reader should, nonetheless, have some basic understanding of what the battered woman syndrome is and some notion of what a battered spouse experiences. Because the experience is generally cyclical in nature, one could describe it from any point, but it is easiest to describe from the point where the woman is battered. When that happens, she may or may not leave the abusive partner.

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[4] *Id.* at 9-10. Dershowitz does not treat the three types of excuses with the same detail as would be the case with traditional legal scholarship. *Compare* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., 1 SUBSTANTIVE CRIMINAL LAW 573-696 (1986). He observes, however, that "[t]hese distinctions [, between justifications, excuses and mitigations,] are not always susceptible to neat categorization." DERSHOWITZ, *supra* note *, at 10.

[5] *See* LENORE WALKER, THE BATTERED WOMAN (1979).

[6] Dershowitz is, however, more descriptive of the cyclical nature of abuse when he recounts that victims of abuse often become abusive and perpetuate violence in that way. Dershowitz, *supra* note *, at 6.

[7] *Id.* at 16.

If she does not leave, it is typical for the violent episode to be followed by a relatively enjoyable period of reconciliation where the abuser intones that the assaultive behavior will not return. The peaceful interlude is typically short lived and the abuser ultimately commits another violent assault. For economic and other reasons, the victimized spouse is seemingly unable to break out of this cycle and away from the abuser.

With this pattern in mind, Dershowitz's chief complaint with the use of this cycle in court concerns the idea that the victim remains in this cycle because of what has been called "learned helplessness."[8] He asserts that a person is not helpless if capable of a premeditated act of violence and he counters with the story of John and Lorena Bobbitt to illustrate this point.

While the Bobbitts' sordid tale is probably familiar to most of us, Dershowitz recounts that Mrs. Bobbitt had suffered for some time at the hands of her husband, John. Ultimately, she alleged that he raped her and that she reacted by severing his penis.[9] Dershowitz, however, finds it important that John was asleep and posed no immediate threat at the time of Lorena's attack. He concludes that if she had been raped, then Mrs. Bobbitt's clear course of action was to report the matter to the police and, as was done, see to it that her attacker was prosecuted for the offense.[10] Her vindication vested, then, in the family and criminal courts.[11] Ultimately, to Dershowitz, Mrs. Bobbitt may very well have been the victim of spousal abuse. On the other hand, she was not in a position where violent self-defense was necessary when she chose to disfigure her husband. In Dershowitz's estimation, Mrs. Bobbitt's actions amounted to a common, wanton act of vengeance.[12] Dershowitz maintains that using the battered woman syndrome as an excuse when the battered spouse commits an assault merely legitimizes retaliatory violence and perpetuates violent behavior.[13]

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[8]DERSHOWITZ, *supra* note *, at 14 (citing WALKER, *supra*, note 5). For more on the debate surrounding the battered woman syndrome and learned helplessness, ***see*** VIOLENCE AGAINST WOMEN 259-308 (Karin L. Swisher & Carol Wekesser eds., 1994). ***See also*** LEWIS OKUN, WOMAN ABUSE 77 (1986) for a general discussion indicating at least some degree of acceptance for Walker's treatment of this societal ill. Okun recounts that other researchers have described the basics of this cycle in various ways. The abusive relationship can be characterized as more than a repetitive experience and as one that gradually worsens into feelings of great frustration, alienation, and widening distance. *Id.* (citing R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES (1979)).

[9]DERSHOWITZ, *supra* note *, at 59.

[10]*Id.*

[11]*Id.*

[12]*Id.* at 26.

[13]*Id.* at 139.

To Dershowitz, other ramifications of the abuse excuse exist as well. Dershowitz asserts that "the abuse excuse is a symptom of a general abdication of responsibility by individuals, families, groups and even nations."[14] Abuse excuses also represent "a modern-day form of vigilantism."[15] This is true not only of the attacker on trial, but may also be said for those juries who would ignore the law and accept an abuse excuse.[16] Defense counsel learn that "when neither the law nor the facts are on [their] client's side, [to] argue abuse."[17] Next, with an abuse excuse, blame is shifted away from the accused and toward the victim when, for example, a victimized spouse retaliates and is criminally prosecuted.[18] When we apply the abuse excuse to the scenario of an attack made by the abused individual on an abuser, the result may be that two dangerous people avoid criminal sanction.[19]

Another important outcome of abuse excuses is that they may tend to perpetuate certain stereotypes. As to battered women, Dershowitz notes that to accept that a battered defendant had no other option but to lash out is to also accept that she did not have the ability to leave and the power to draw the abusive relationship to a close. This serves only to perpetuate the idea that women are weak, helpless, and lacking in self-control.[20] Dershowitz observes that the vast majority of battered women do not respond to being battered by committing cold-blooded acts of violence.[21]

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[14] *Id.* at 4.

[15] *Id.*

[16] *Id.* at *5-6, 17, 27.* Investigating those factors that may motivate a jury and those events that create popular perspectives is beyond the scope of this review. Dershowitz posits that the ordinary person hears frequently about tales of abuse. Hence, he concludes that jurors may be more receptive to those stories when they come into the courtroom. *Id.* at **46.** It might be that the explanation is even more simple. Again, as Dershowitz points out, several forms of excuses have been alive and well within our courtrooms for sometime. Perhaps, the modern iteration of these legal notions are easier for lay jurors to understand than the complex and wordy instructions about relatively abstract concepts such as extenuation, mitigation, and the like. Juror reactions to novel defenses may simply be a way of coming to grips with horrible events. Perhaps juries are so hungry to hear both sides of a story that given any explanation they will tend to vote for acquittal. On the other hand, it is possible to conclude that there is something desperately wrong with the general population's understanding of our criminal justice system. It is interesting to note that a recent poll indicates that O.J. Simpson, Mike Tyson, and Tonya Harding rank among the top twenty most admired athletes. ***See This Week's*** *Sign* ***That the Apocalypse*** *Is upon* ***Us,*** **SPORTS** ILLUSTRATED, June 5,1995, at **22.**

[17] DERSHOWITZ, ***supra*** note *, at 47.

[18] *Id.* at 19.

[19] *Id.* at 17.

[20] *Id.* at *30, 55.*

[21] *Id.* at *30,* 139. The same can be said of those who have suffered racial, sexual, and other forms of abuse.

In another of Dershowitz's examples, one defendant successfully defended her charges of drunken driving and assault by using another excuse. She asserted that premenstrual syndrome caused her to absorb alcohol more quickly and to become quite hostile toward her arresting officer and even the Breathalyzer machine.[22] Dershowitz finds that allowing this defense serves only to legitimize another repugnant, stereotypical conclusion about women.[23]

Dershowitz provides further argument for his idea about stereotypes when he examines the so-called "black rage" defense. With this particular syndrome, he finds that it has been asserted that disparate social conditions have left certain members of minority groups full of rage which, unfortunately, is released from time to time, through acts of violence.[24] Dershowitz believes that validation of this excuse serves to justify fear of certain racial groups. According to Dershowitz, another part of the backlash includes the bolstering of racist arguments for stiffer sentences for members of those racial groups who commit crimes.[25] In this regard, abuse excuses "undercut the credibility of legitimate defenses in appropriate cases [and] . . . stigmatize entire groups of people—women, blacks and others—who share characteristics in common with the criminals but who do not commit similar crimes."[26]

With his discussion of the battered woman syndrome, the black rage defense, and similar excuses, Dershowitz fleshes out his major arguments and conclusions about the abuse excuse. In all, he identifies and lists forty syndromes[27] and like excuses. To present his many arguments, Dershowitz organizes the book around a lengthy introductory chapter, a detailed glossary, and sixty-six chapters. Each chapter is actually a short essay that discusses the various abuse excuses and related topics. Not all of the listed excuses are, however, covered with the same depth and breadth. For example,

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[22] *Id.* at 53-54.

[23] *Id.* at 31, 55.

[24] *Id.* at 89.

[25] *Id.* at 90.

[26] *Id.* at 29.

[27] Dershowitz believes that the term "syndrome" is often taken out of context from its established medical definition. He defines '"syndrome'. . . [as] a medical or psychological term referring to a group of symptoms or characteristics, all or most of which appear in common when the 'syndrome' is present." Id. at 12-13 (footnote omitted). As to the battered woman syndrome and learned helplessness, "[t]he battered woman syndrome is a bit of a stretch from the paradigm of medically recognized syndromes." Id. at 14. This is because "the battered woman syndrome . . . does not include or explain . . . the killing of the abuser by the abused woman." Id. at 15. Instead, "[t]he battered woman syndrome purports to explain not why the abused woman killed her batterer, but rather why she did not—and indeed could not—leave her batterer." Id.

the book provides a very limited discussion of posttraumatic stress disorder and what the author calls 'Vietnam syndrome."[28] However, one should not assume that the book's sole purpose is to provide a more detailed discussion of headline grabbing news stories, such as those of the Bobbitts and the Menendez brothers.[29] The author not only goes beyond the press accounts, but his attention turns to examine his primary thesis on a larger scale.

In the first part of the book, Dershowitz concentrates on the particular excuses and how they have been played out in specific cases. Toward the conclusion of Part I, he moves on to other problems on the international stage. For example, while in Paris over the Jewish holiday, Simchat Torah, he personally found that security measures at the synagogues were extreme. His own shoes were searched before he could enter a place of worship. As it turns out, the French authorities were highly concerned that Palestinian terrorists might attack the crowds particularly since this holiday would bring many children to the temples. The heightened security was, nonetheless, quite routine according to one of the guards on duty.[30] These events arguably represent one of the upshots of the abuse excuse. Again, on a personal level, to accept as legitimate an individual's murderous retaliation is to legitimize violent behavior. On a broader scale, dealing with terrorists and acceding to their demands serves to legitimize terrorists acts. Dershowitz believes that terrorism, just like acts of violent retaliation, becomes accepted as a way of getting one's point across.[31]

In the second series of essays that comprise Part II of the book, Dershowitz discusses what he summarizes in his title as, " 'The Everyone Does It' Excuse.'' Beyond the title, it is difficult to follow

[28] Posttraumatic stress disorder, as Dershowitz notes, is a recognized psychological disorder "triggered by a psychologically distressing event 'that is outside the range of usual human experience."' *Id.* at 333 (quoting DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, VERSION III 247 (revised ed. 1987) [hereinafter DSM-III-R]. Apparently, certain persons who commit acts of violence may do so in response to remote instances of abuse or harassment that they have suffered. DERSHOWITZ, *supru* note *, at 334. Vietnam syndrome, then, is "[a] variation of posttraumatic stress disorder." *Id.* at 340. Military war service replaces an abusive experience as the distressing event. Although the *DSM-III-R* includes posttraumatic stress disorder as a diagnosable disorder, Vietnam syndrome is not, as Dershowitz implies, specifically recognized. *See DSM-III-R, supra,* app. G, at 506 (Alphabetical Listing of *DSM-III-R* Diagnoses and Codes).

[29] The Menendez brothers are Lyle and Eric Menendez and, as with the Bobbitts, most readers undoubtedly will recall that they have had two jury trials for the murder of their parents. The gist of their defense was that they were abused as children. Here too, Dershowitz finds that they were grown men without the need for violent self-defense at the time they committed the murders. They acted, it seems to Dershowitz, in retaliation for remote abusive episodes rather than from any legally justifiable position. DERSHOWITZ, *supra* note *, at 21, 46.

[30] *Id.* at 146.

[31] *Id.* at 147.

the thread that supposedly links it to his examination of abuse excuses.[32] In fact, many of the essays in Part II merely recount tales of scandal and depict representative instances of official misconduct. Here, Dershowitz writes of prosecutors who buy witnesses, police officers who lie, judges who are bigots, and even higher officials who have betrayed the public's trust.

Finally, in Part III, the author characterizes political correctness as an excuse. His principal concern in this area is to consider what violence political correctness does to free speech. To illustrate this particular notion, Dershowitz finds that sexual harassment legislation is of two categories. First, there are those laws that address specific instances of discrimination and harassment. The other type seeks to stifle more subjective conduct.[33] On this topic, he sees the second type of laws as an overly politically correct response to sexual harassment.

Among the examples that the author offers in this area is the striking one of Professor Graydon Snyder of the Chicago Theological Seminary. Over the course of many years, Professor Snyder used, in class lectures, certain examples of sexual encounters found in the Talmud and the New Testament. Snyder did this so as to examine and distinguish between Jewish and Christian attitudes toward sex. This approach, however, led one female student to conclude that the professor was insensitive to rape. Dershowitz's plea in response is that "sexual harassment laws . . . not be allowed to become speech codes designed by radical feminists to circumvent the First Amendment."[34] In a general sense, he believes that those who define what is politically correct go beyond a critical discussion that addresses the message conveyed through particular forms of speech. Instead of challenging the intrinsic worth of pornography, for example, they respond that pornography is wrong and seek its immediate banishment from the proverbial market place of ideas.[35] While one can equate this type of outcome with the circumnavigation that the judicial system faces when asked to legitimize abuse as an excuse for a subsequent act of premeditated violence, it is difficult, in the book's last third, to understand exactly how we should link these essays up with the book's main theme.[36]

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[32]The author indicates, however, that "[t]hese excuses, like the abuse excuses in Part One, are an attempt to deflect personal accountability—in this instance from the person accused of corruption onto 'the system' or some other institutional scapegoat." *Id.* at 41.

[33]*Id.* at 251.

[34]*Id.* at 253.

[35]*Id.* at 249.

[36]Dershowitz explains his point when he writes that there are "some radical leftists, feminists, minorities and others who perceive themselves as victims of long term abuse by 'the system."' *Id.* at 42. Unlike a battered spouse who asserts victim-

If excuses are as rife as Dershowitz posits, then there is something for judge advocates at all levels in ***The Abuse Excuse.*** It should matter not whether the particular issues that the military attorney handles are those involving procurement fraud or whether they concern the more familiar problems of the legal assistance client. ***The Abuse Excuse*** is, at its core, about lawyers and the lawyering process. Attorneys, military or otherwise, should be interested in what Dershowitz has to say about our system of justice. On the other hand, the book is obviously written for a broader audience. It uses nontechnical terminology and is not concerned with rules of evidence, statistics, and pattern instructions. Instead, the author bases his arguments and conclusions on specific cases and events. Even so, the ethical discussion that the book provides should be quite useful for judges and trial practitioners with a need to recognize where abuse excuses fit and fail to fit within our existing jurisprudence. The book's responses to abuse excuses may be helpful to those with a need to present countervailing ideas before a jury or other trier of fact. At the very least, ***The Abuse Excuse*** serves to remind us that many "syndromes" should be challenged for their statistical validity and acceptance by the relevant professional community.

As strong as the book is, it still has certain notable weaknesses. For example, the essence of what Dershowitz calls an "abuse excuse" is what we have always thought of as vigilantism. In this regard, his insight is not all that profound. Additionally, his discussion of terrorism and certain international problems is not all that unique. These weaknesses, however, do no great damage to the book's central messages which warrant serious consideration by the legal community, particularly by those of the trial bar and bench.

In the final analysis, ***The Abuse Excuse*** is a timely work written for a broad audience. The book is also well composed and makes for an easy read. Much of it deals with provocative topics such as the battered woman syndrome. Our society obviously faces any number of real problems such as spousal abuse, poverty, and discrimination. ***The Abuse Excuse*** teaches that conjuring excuses for inappropriate responses to these types of problems does little to resolve the forces giving rise to the actual problems. Excuses may even exacerbate rather than correct. Ultimately, the discussions and themes found in ***The Abuse Excuse*** provide few answers for society's problems but they do serve as a starting point for recognizing the dilemmas that we face.

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ization as a defense for retaliatory violence, these groups are proactive "offer[ing] their abuse [by the system] as an excuse for demanding censorship, special rules, and double standards for judging their victimization and the appropriate societal response to it." *Id.*

THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY*

REVIEWED BY MAJOR WILLIAM K. LIETZAU**

Alan Dershowitz's acerbic discourse has frequently alienated conservative elements of society. "his time, in ***The Abuse Excuse,*** he alienates everybody. Dershowitz vilifies every litigation tactic from the burgeoning prevalence of sexual harassment complaints to the nascent criminal defense of "black rage." He criticizes community leaders from Massachusetts Probate Judge B. Joseph Fitzsimmons, Jr., to German Chancellor Helmut Kohl, and maligns everyone from John Demjanjuk, the acquitted "Ivan the Terrible" look alike, to the senior trustee of the Yale University Corporation. Schools are attacked for practicing both corporal punishment and political correctness; feminists are reproved for their antagonism toward pornography as well as their failure to support Paula Jones in her suit against the President. According to Dershowitz, Congress should investigate the Weinberger pardon, society should build more toilets for women, and the government should remove J. Edgar Hoover's name from the FBI building. All who read ***The Abuse Excuse*** are guaranteed to find something provocative.

It might seem improbable that all the above topics are appropriately subsumed within a single theme, and therein lies my principal criticism of the book; they are not. Professor Dershowitz describes no specific purpose for the book, and its title is admittedly broad, but the repeated assertion of a single motif in the introduction leads to unmet reader expectations.

In his introduction, the author focuses on the legal tactic by which criminal defendants excuse their violence with the claim of a history of abuse. He cites the increasing number of defense lawyers employing this tactic and contends that criminal defendants are starting to use the abuse excuse as a license to kill and maim—a dangerous trend. Professor Dershowitz has indeed selected a superb

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*ALAN M. DERSHOWITZ, THE ABUSE EXCUSE *AND* OTHER COP-OUTS, SOB STORIES, *AND* EVASIONS OF **RESPONSIBILITY** (Boston: Little, Brown & Co. 1994); **341** pages, $12.95 (softcover).

United States Marine ***Corps.* Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

topic, one worthy of scholarly discourse, but he both exceeds the scope of his thesis and inadequately addresses the hard questions that it raises.

Other than the relatively lengthy introduction, a brief conclusion, and a glossary, ***The Abuse Excuse*** is essentially a collection of short essays, sixty-six to be exact. Dershowitz organizes the essays into three parts. Part I appropriately shares the book's title and contains articles that give examples of various criminal excuse defenses. Part II is entitled "'The Everyone Does It' Excuse: Official Corruption and Misconduct," and Part III is fashioned, "The Political Correctness Excuse: Sexual Harassment, Censorship, Feminism, and Equality."

Part I is the only section that directly relates to the purported topic: the plethora of abuse excuses currently at work in our justice system, their increasing success with jurors, and the detrimental effect that they are having on society. The essays in this section introduce some of the myriad abuse excuses, primarily through anecdotes and brief comments. The pace is quick, the stories are entertaining, and the subject matter is easily digested. Reasonably informed readers will quickly recall salient facts attending most anecdotes because Dershowitz chooses infamous cases and well-known personalities. Through reflections on the first Menendez brothers prosecution, the Tonya Harding case, the Woody Allen divorce, and others, he identifies a wide variety of excuses that echo in today's courtrooms.

The essays complement a useful glossary of criminal abuse-related defenses. Together they describe justifications such as: battered woman syndrome, adopted child syndrome, sexual abuse syndrome, posttraumatic stress disorder, and rape trauma syndrome. The author provides examples of judicial success for most of these more common defenses, but he also introduces more esoteric abuse excuses such as: tobacco deprivation syndrome, **UFO** survivor syndrome, computer addiction, Super Bowl Sunday syndrome, and the "twinkies made me do it" defense. Each essay is independent of the others, and rarely does Dershowitz attempt to draw larger conclusions within the individual articles.

Although the glossary furnishes at least one reference for each excuse listed, ***The Abuse Excuse*** is not an academic resource. Much of Dershowitz's material is common knowledge, and, other than the glossary?he provides no sources for his facts and no citations to comparable opinions. More importantly, the essays do not all directly relate to his central theme. They were written over a period of several years, and not necessarily with this book in mind. The intro-

duction suggests an interesting mosaic yielding broad conclusions. Part I provides pieces for that mosaic, but they are never connected to form the sweeping image suggested by the prologue.

The Abuse Excuse seems to stray farther from its theme in each succeeding composition. Part I's anecdotes begin to depart from the pattern of criminal excuse examples as Dershowitz takes on subjects like Louis Farrakhan's shameful bigotry and scapegoating of Jews. In this essay, for example, the author highlights Farrakhan's factual misrepresentations regarding the Jewish role in slavery. He persuasively argues that neither the past horrors of slavery nor the "good works" wrought by Farrakhan's movement justifies deceptive misinformation.

The tie between essays like the censure of Farrakhan and the theme of criminal excuse defenses is attenuated at best. The connection weakens further as Dershowitz strays into topics such as a comparison between flogging in Singapore and corporal punishment in American schools, or the failure of German society to adequately attack Nazism. Hypocrisy and the fact that people find excuses for their indiscretions are hardly novel concepts. The relevant concern is the success criminal defense lawyers are beginning to have with the abuse excuse. This is a worthy topic, and Dershowitz should have kept to it.

If Part I begins to wander, Parts II and III depart completely from any remnants of a logical course. There is a hint of this digression in the introduction when Dershowitz extrapolates his thesis, opining that the proliferation of criminal excuses is a symptom of a more general problem, the national abdication of personal responsibility. Dershowitz comments on government corruption, international justifications, and political movements—which he argues all find their genesis in excuse making. The fit with criminal defense excuses is somewhat tortured, but, at least in the introduction, there is a colorable nexus. Unfortunately, in their substance, Parts II and III fail to complete the loop. Dershowitz thereby commits a cardinal sin of trial advocacy; he makes promises in an opening statement, but fails to deliver with evidence.

Part II is an intriguing collection of articles that effectively demonstrate the author's complexity and intellectual consistency as a political pundit. However, they do little to take the reader farther along his presumed quest for deeper understanding of the abuse excuse and potential remedies. Professor Dershowitz tackles subjects such as the declassification of material used by the government to prosecute the American spy, Jonathan Pollard. He contends that such declassification will reveal that Pollard is far less

culpable than the public was led to believe and calls for Pollard's immediate release. A similar example is the author's summary of facts supporting his opinion that J. Edgar Hoover is not worthy of canonization on the concrete facade of the FBI building. Perhaps these are valid concerns, but Dershowitz is far afield of logical reader expectations.

Part III is an equally lively collection of essays criticizing various aspects of the feminist movement. Here Dershowitz argues that sexual harassment is overused, and he defends pornography from its feminist assailants as the necessary progeny of a society that values free speech. He resoundingly impugns censorship as well as the Andrea Dworkins and Catharine MacKinnons of the world, but feminists are given a brief respite in Dershowitz's essay advocating "potty parity" (legislation requiring new construction to embrace the two to one ratio for female to male toilets). All subjects are independently worthy of colloquy, but the intellectual titillation only distracts readers from the promised theme.

If the varied examples in the above paragraphs seem disjointed, then they successfully portray the primary weakness of ***The Abuse Excuse.*** Professor Dershowitz outlines his entire thesis in the introduction. The body of the book does nothing to expand on it, and the conclusion does little more than explore the erroneous prediction that **O.J.** Simpson would use a battered husband defense in his murder trial. Thus, we are left with the introductory essay which is really the *summum bonum* of the book.

Some of Professor Dershowitz's prefatory comments are indeed intriguing and worthy of reflection. The author points out how excuses are usually mitigating factors and not defenses, but that there has been an alarming trend to fit these excuses into theories of self-defense, provocation, and insanity. While some might misinterpret the author's critiques as targeting the defense bar, the focus of his concern is more accurately that so many juries are buying the excuse defenses. Dershowitz submits that the success of abuse excuses is found in a deep-seated need to control one's own environment. Because society has been unsuccessful in protecting the victims of abuse, these victims are entitled to vigilante justice. This is an interesting theory that might explain why abuse excuses have largely remained mitigating sentencing factors in military courts, while they have been the basis of acquittals in numerous civilian criminal trials (the military subculture may not suffer from the same government failure to curtail violent crime).

Professor Dershowitz also deftly identifies societal harms consequent to expansive abuse excuse claims, such as the endanger-

ment of civil liberties, the invitation to vigilantism, and the perpetuation of the cycle of violence. He similarly cites the stigmatization of people who share characteristics with abuse victims but eschew the criminal response. According to Dershowitz, recognition of an abuse excuse that is related to someone's minority status has the collateral effect of encouraging bigotry and an unwarranted generalization that members of that minority group are likely to engage in criminal behavior. For example, if we accept the defense of black rage, we foster fear and distrust of blacks. This is a subtle concern rarely captured by sensational headlines, and Dershowitz should be applauded for identifying it.

Many people view successful abuse excuse defenses as judicial anomalies. Comments about our beleaguered justice system are frequently only tongue in cheek, but Dershowitz's introductory essay evokes a more thoughtful reflection. Perhaps a systemic malady indeed exists. The author's engaging introductory remarks encourage the reader to move past the overture to the critical analysis of cases and theories one would expect to follow. Unfortunately, these expectations are not met.

The mere identification of an emerging trend is an inadequate aspiration for the book. The author's concluding entreaty for us to "confront the issues" and "start taking responsibility" is remarkably pedestrian. As a leading criminal defense lawyer and celebrated Harvard Law Professor, one would expect more from Alan Dershowitz than the mere illustration of a disturbing defense tactic and a few insightful comments regarding its deleterious consequences. The logical conclusion of Dershowitz's collection would be a proposed solution, but that solution is never proffered.

Yes, Dershowitz has performed a service by identifying various excuse defenses and weaving them into a recognizable pattern. His disjointed collection of essays, however, only serves to unravel the fabric. ***The Abuse Excuse*** loses its focus and Dershowitz begs the important question of what should be done to reverse the dangerous trend. Is there an appropriate legislative fix? Should rules of evidence limit the introduction of abuse excuse evidence on the merits? Are there appropriate jury instructions to rectify the problem? Unfortunately, one of the great minds of the day has failed to take the step men of his stature are beholden to take. We are left with a collection of vitriolic criticisms and no constructive recommendations.

The Abuse Excuse is a thought-provoking introductory essay encased in the pages and binding of a book. As the work of a distinguished legal mind, it is worth a quick read. But one should limit expectations. Dershowitz did not finish his work. Perhaps the glossary should include, "overworked professor syndrome" or "the lazy-writer defense."

CRUSADE IN EUROPE*

REVIEWED BY MAJOR MAURICE A. LESCAULT, JR.*

Daily as [World War 11]progressed there grew within me the conviction that as never before . . . the forces that stood for human good and men's rights were this time confronted by a completely evil conspiracy with which no compromise could be tolerated. Because only by the utter destruction of the Axis was a decent world possible, the war became for me a crusade in the traditional sense of that often misused word.—General Dwight D. Eisenhower1

I. Introduction

In modern America, the perception of many seems to be that the conflict in Vietnam was the defining moment of this century. While Vietnam certainly influenced American culture, the defining event of this century was World War II.[2] In that titanic struggle, the United States realized its massive potential and became the leader of the free world.3 Losing sight of this reality has a variety of consequences. Significant among these is a lack of appreciation for the sacrifices made by the citizens of the Allied nations to oppose Nazi aggression. A further consequence is a diminishment of the stature accorded to the leaders who stepped forward to guide the world to freedom from oppression. In my view, ignoring these great events and their leaders would be a mistake.

The political and military leaders of World War II read as a list of the giants of history—Roosevelt, MacArthur, Marshall, Bradley, and Patton. However, the most important military leader of the war, arguably, is General Dwight D. Eisenhower. It was Eisenhower

*DWIGHT D. EISENHOWER, CRUSADE IN EUROPE (New York: Doubleday *1990)* (1948);*559* pages, *$17.50* (softcover).

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~EISENHOWER,supra note *, at *157*

[2]*See* TAD SZULC, THEN AND NOW HOW THE WORLD HAS CHANGED SINCE WWII 15-18 (1990); ALLAN NEVINS & HENRY STEELE COMMAGER, A POCKET HISTORY OF THE UNITED STATES *434-35* (8th ed. *1986).*

[3]*See* NEVINS & COMMAGER, supra note **2,** at 434-43

who paired soldierly virtues of discipline, courage, and tenacity with an uncanny political savvy that could hold together an alliance and make it victorious.[4] It is difficult to rival his accomplishments in this century: a meteoric rise from lieutenant colonel to General of the Army; commander of the mightiest armada ever assembled;[5] the first to command a truly successful allied war effort; victor over the greatest force for evil the world has yet known; and, later, President of the United States for two terms. His thoughts and reflections on the campaign that brought him to national prominence are timeless and valuable.

It is wholly appropriate that, in honor of the one hundredth anniversary of his birth and shortly preceding the fiftieth anniversary of D-Day in Normandy, his memoir of World War II has been re-released. General Eisenhower's reflections on the politics of the war, its personalities, and the soldiers who won the great Allied victory are entertaining and informative. We make much today of Operations Desert Shield and Desert Storm—and indeed the coalition formed to combat Saddam Hussein was impressive. However, the size of that force, the gravity of the situation, the duration and scope of the conflict, and the price of failure pales in comparison to World War 11. Any student of allied operations or coalition warfare will profit from reconsidering (or considering for the first time) *Crusade in Europe*. This book is a timeless reminder of a generation who did not shrink from a daunting task, but stood up so that we might enjoy the benefits of freedom.

As a memoir, the book is not pure history, but is history as General Eisenhower remembers it from his participation in the war effort. Despite this singular perspective, General Eisenhower supports his facts with references to official reports. The Doubleday release also contains a helpful index to quickly locate anecdotes or comments on particular persons or events.

Beginning as an unknown lieutenant colonel on the staff of General Douglas MacArthur, Eisenhower moved through a series of leadership positions as the United States began to mobilize from a position of absolute unpreparedness to become the arsenal and army of democracy. Eventually, the War Department summoned him to Washington, D.C. Ironically, his initial assignment was to provide expertise in the ways that the United States could continue to help

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[4] *See* STEPHEN E. AMBROSE, EISENHOWER 9 (1983).

[5] General Eisenhower reports the Allied strength in Europe at the time of Operation Overlord as 2,876,439 soldiers, sailors, airmen, and marines Additionally, the United States had ready to sail another **41** divisions when British ports could accept them. EISENHOWER, *supra* note *, at 53.

the Philippines hold out against the Japanese. It was in this position, however, that he would impress Army Chief of Staff George Marshall sufficiently to warrant his selection as the Commander of the United States Forces in Europe.

The remainder, and vast majority, of the book discusses the conduct of the campaigns in the European Theater and their aftermath. The progression of victory beginning in North Africa, through Sicily and Italy, to the beaches of Normandy, across France, and finally into the heart of the Rhineland is familiar to most Americans. Equally familiar are many of the individual battles and their heroes. While General Eisenhower discusses the campaigns, the strategy that underlies them, and the rationale of decisions made, these are not his focus. Instead, he uses them as a backdrop to discuss the political issues, personality problems, and interesting anecdotes that arise when people are planning and executing the significant events of history.

II. The Politics of War

> *[P]olitics and military activities are never completely separable.—General Dwight D. Eisenhower*[6]

Perhaps the most daunting task facing General Eisenhower as Supreme Allied Commander was the politics of holding the Allies together through several years of total war. His ability to choose the correct course of action militarily, and make it work politically, was unique in the War. Consequently, the General sprinkles political anecdotes throughout the book. Two are illustrative.

Political struggles occurred early, and often from unexpected sources. At the beginning of the campaign in North Africa, Vichy French resistance was a concern. The Allied leadership felt that certain French leaders may be able to effectively order the French in the area not to resist. After intense study and negotiation, the Allies identified General Giraud as the best candidate. The Allies arranged his escape from occupied France only to find that General Giraud refused to participate unless they gave him complete command of the Allied forces to immediately go about liberating France. As a result, Eisenhower decided to use a new contact, less politically acceptable in America. All this caused consternation for Eisenhower who, while commanding the first major Allied operation of the war, had to volley telegrams back and forth to both London and Washington, D.C. His ability to satisfy both governments quickly

[6] *Id.* at 367.

allowed him to effectively diminish French resistance and maintain his focus on the campaign at hand.[7]

Political rumblings also came from the British. Disagreement arose with Winston Churchill regarding the most fundamental decision of the War—the necessity of a cross-channel invasion.

The Allies had decided early to focus on the defeat of the European Axis Powers first. While this appears to be a remarkable decision from the American perspective—since we were under direct attack from the Japanese—General Eisenhower relates the proper political and military reasons for it. Foremost, was that the European members of the Axis Powers were the only ones that the three remaining Allied powers could attack simultaneously. The United States was the only nation free to choose where to attack first. Attacking Japan first could result in the defeat of Britain and Russia before the United States turned its attention to Europe. Politically, this was unacceptable. Additionally, liberating Europe still would be politically necessary, even after defeating Japan. Attacking Europe alone after the Germans had more time for weapons development and production was militarily unthinkable.

As early as April 1942, the Allies accepted the cross-channel invasion as the best means to concentrate power against the Axis, and particularly Germany. General Eisenhower staunchly defended this approach throughout the campaign in Europe for two reasons. First, it was the best approach militarily, a fact borne out by history. Second, following the early decision, the Allies geared all planning and development of forces and weapon systems—in both the military and civilian sectors—toward this approach. Changing course could have been disastrous.

Despite the early commitment of his nation to this course of action, Mr. Churchill often challenged the conclusion, particularly after the great early success of the campaign in Italy. While not abandoning the cross-channel invasion, Churchill and his senior military advisors pressed for delay and pursuit of the gains made in Italy. They feared the very real dangers involved in an amphibious landing—especially against the well-defended Normandy coast. Militarily, however, the only way to really mass force against Germany was through northern France. Going through southern France required movement through narrow roads leading from the Riviera, making mass difficult to achieve and exposing the Allied forces to the enemy. General Eisenhower demonstrated his ability to withstand the political pressures from the great orator, Churchill,

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[7] *Id.* at 107-12.

while still performing his military duties. Eisenhower's resolve was persuasive. Shortly before Operation Overlord began, Churchill stated, "Gentleman, I am hardening toward this enterprise."[8]

These examples demonstrate General Eisenhower's adroit handling of political matters. In both cases, his military expertise and resolve, matched with political sensitivity, carried the day. These situations, and the others like them, also are entertaining because they offer insight into the personalities of the great men with whom Eisenhower was dealing.

III. The Personalities That Led

> *The personalities of senior commanders and staff officers are of special importance. Professional military ability and strength of character, always required in high military position, are often marred by unfortunate characteristics, the two most frequently encountered and hurtful ones being a too obvious avidity for public acclaim and the delusion that strength of purpose demands arrogant and even insufferable deportment.* — *General Dwight D. Eisenhower*[9]

One of the most interesting aspects of the book is General Eisenhower's reflections on his dealings with the political and military personalities of the time. Eisenhower's greatest success, arguably, was to meld the various conflicting personalities on the Allied team into a cohesive unit. In his discussion, however, General Eisenhower is unnecessarily subdued in any criticism of these men. The joy of victory may have colored his recollection, or perhaps he was just being a gentleman in the classic sense. Despite this rosy complexion in his description of incidents and attitudes, these episodes provide interesting anecdotes about coalition warfare, the people who fought it, and the difficulties facing the overall commander. Examples are Eisenhower's dealing with both Generals Patton and Montgomery — two of the stronger personalities in the Allied camp.

Patton and Montgomery rank among the finest battlefield commanders of the war. However, both were egotistical, and often engaged in competition with each other for supremacy and in behavior that caused consternation among their superiors. It was here that General Eisenhower demonstrated leadership and a vision that

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[8] *Id.* at **245.**

[9] *Id.* at **75.**

never lost sight of the overall objective of Allied victory. General Eisenhower understood these men and effectively dealt with their idiosyncrasies so that their talents were available to support the war effort.

General Patton's most famous loss of control was his slapping a battle-fatigued soldier in a hospital during the campaign in Sicily. Most are familiar with this account from the book or movie version of Patton. However, Eisenhower's account adds depth to the incident. He gives the background of a friend who had known Patton many years and Eisenhower's account provides added insight into Patton, the man. His handling of the situation also provides lessons for judge advocates and commanders in the area of discipline. General Eisenhower investigated fully, allowed for the human failings of General Patton, took appropriate disciplinary action, and reformed the leader for continued service in the war effort. Patton's emotional written apology after the incident[10] and that he did not repeat his failure in judgment during the war evidence the effectiveness of Eisenhower's approach.

Montgomery's fundamental problem revolved around his nationalistic fervor and desire for personal acclaim. Used fairly and equally by Eisenhower, he commanded a portion of the line when the Allies responded to the German counterattack into the Ardennes—the so-called "Battle of the Bulge.'' In a postbattle press conference, Montgomery presented himself as the savior of the Americans who had placed him in charge to save the battle. Eisenhower kindly dismisses the implication as unintentional, but rightly expresses the severe problem that it caused him with American commanders who desired to reciprocate. Eisenhower skillfully diffused the situation and prevented a rift between the Allies—at least one that would cause problems on the battlefield.

111. The True Heroes of War

> *Humility must always be the portion of any man who receives acclaim earned in the blood of his followers and the sacrifices of his friends.— General Dwight D. Eisenhower*[11]

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[10]General Eisenhower quotes Patton's reply as, "I am at a loss to find words with which to express my chagrin and grief at having given you, a man to whom I owe everything and for whom I would gladly lay down my life, cause to be displeased with me" *Id.* at 183.

[11]Address at Guildhall, London, July 12, 1945, *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 1015 (14th ed 1968).

General Eisenhower's view of the war is not from the foxhole. Many works, like John Keegan's *The Face of Battle,* focus on the heroic efforts and sacrifices of the individual soldier that so often turn the tide on the battlefield. General Eisenhower, on the other hand, discusses movements of hundreds of thousands of men, taking prisoners in the millions—he describes war on a grand scale. Eisenhower's account of the war effort does not impress the reader through the recounting of the pain and suffering of individuals. Rather, he illuminates the massiveness of the effort, the daring moves of the generals, and the weight of responsibility of ordering millions of soldiers into harm's way.

Crusade in Europe does contain several fine tributes to the men and women who made the difference on the front lines. General Eisenhower is not unaware or unappreciative of the ground soldier. The book describes his frequent visits to the soldiers "in the trenches." While the work reflects his experience at the highest levels of command, it appropriately concludes acknowledging the contributions of individual Americans who made sacrifices great and small to save the world from tyranny. At its core, *Crusade in Europe* is the humble reflections of a man blessed with the privilege, and burdened with the responsibility, of leading millions of soldiers in combat, supported by the sacrifices of the entire population of the Allied nations. Consequently, it is the story of a glorious time when our people rose to stand against tyranny. General Eisenhower's work remains a classic military memoir that offers lessons to students of warfare while reminding us of the sacrifices of our ancestors from which we continue to benefit today.

> *Never in the field of human conflict was so much owed by so many to so few.—Sir Winston Churchill*[12]

[12] *Quoted in* BARTLETT, *supra* note *11,* **at 921.**

DANCING WITH THE DEVIL; SEX, ESPIONAGE AND THE U.S. MARINES: THE CLAYTON LONETREE STORY*

REVIEWED BY CAPTAIN MICHAEL J. HOOD**

Mixing the CIA, the KGB, a beautiful woman, and a sergeant in the Marine Corps seems more the recipe for a Robert Ludlum thriller than the true story of Sergeant Clayton Lonetree's journey into the world of espionage. Ask any civilian or military member who Clayton Lonetree is and you will undoubtedly get the same response; he was a Marine spy, a modern day Benedict Arnold. This is usually the extent of the answer, even when the question is posed of Marines. Most people know little of the details that surrounded this well-publicized espionage case. How could a Sergeant in the United States Marine Corps betray his country? How was he recruited by the KGB? How was he caught? What happened at his trial? Where is Clayton Lonetree now? Best selling author Rodney Barker answers these questions and many more in his superb new book, *Dancing with the Devil; Sex, Espionage and the U.S. Marines: The Clayton Lonetree Story.*

The book begins in Vienna where Clayton Lonetree turns himself in to a CIA operative. From this point the book reads like a novel as Lonetree is questioned by the CIA, Naval Criminal Investigative Service (NCIS), and a bevy of other governmental organizations. The author chooses an interesting method of relaying the events of the case. Instead of simply moving chronologically through them, he elects to let each phase of Sergeant Lonetree's ill-fated journey elicit details in a well-crafted flashback approach.

Some of the story initially comes by way of Lonetree's confession to the various agencies involved. Because Lonetree's confession was not completely candid, the reader gets only the basics of how Sergeant Lonetree became entangled with the KGB and betrayed his country. The book then moves quickly to the interrogation and subsequent trial of Clayton Lonetree by court-martial.

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*RODNEY BARKER, DANCING WITH THE DEVIL; SEX, ESPIONAGE AND THE U.S. MARINES: THE CLAYTON LONETREE STORY (Simon Schuster 1996); 335 pages, $24.00 (hardcover).

**United States Marine Corps. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School. United States Army, Charlottesville, Virginia.

The author gives a realistic account of a court-martial, complete with the competing interests of the Marine Corps, the civilian lawyers, and the prosecution team. Mr. Barker takes the reader through virtually every aspect of the trial from opening statements to closing arguments. As the trial unfolds, he is able to examine the different personalties involved as well as give further detail of Lonetree's involvement.

The trial sequence is well written and accurate. It is devoid of the usual mistakes made when **a** civilian attempts to explain the court-martial process. The author believes in the fairness of the system despite the frequent criticism of Lonetree's civilian lawyer, William Kunstler. Mr. Barker does not mince words and his view of Mr. Kunstler and his grand standing tactics is clear. He expresses the opinion that the civilian attorneys were advancing their own agendas with little thought of what was best for Clayton Lonetree. As an example, Mr. Kunstler attempts to persuade the media and jury that Sergeant Lonetree was the victim of an establishment that was prejudiced toward the Native American. The author rejects this premise time and time again, leaving only Mr. Kunstler's theatrics in support. Contrary to Mr. Kunstler, the author takes a neutral stance on these events throughout and crafts his book in such a way as to allow the reader to make his or her own decisions about the case.

Clayton Lonetree ultimately was sentenced to thirty years confinement. This sentence was reduced by five years after substantial posttrial cooperation with a number *of* government agencies. At the United States Court of Military Appeals, the judges concluded that Lonetree's civilian counsel had been ineffective in their failure to pursue a plea agreement. Consequently, a new sentencing hearing was held in 1993, resulting in an additional five-year reduction.

An interesting turn of events further reduced Lonetree's sentence. The Aldrich Ames espionage case had broken and much of the intelligence damage blamed on Lonetree's action was thought to have been caused by Ames. The general court-martial convening authority felt that although Lonetree's actions required severe punishment, the developments in the Ames case warranted a further reduction of five years.[1] The author effectively uses these posttrial developments to give the reader further details about Lonetree's actions and the military judicial system in general.

Finally, Mr. Barker uses his three-month research trip to Moscow to fill in the missing pieces of the story. Up to this point in

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'Subsequently, Lonetree was released from prison in March of 1996.

the book, the Russian perspective has been conspicuously absent. Additionally, because Lonetree did not take the stand at his court-martial, this aspect is critical to fully understand the KGB's recruitment of Sergeant Lonetree.

Lonetree was recruited in a typical KGB fashion. Violetta Seina, an interpreter at the American Embassy in Moscow, reported Sergeant Lonetree's romantic advances to her to the KGB. She then introduced Sergeant Lonetree to her "Uncle Sasha," who was actually Alexei Yefimov, a KGB operative. After spending a great deal of time gaining Lonetree's friendship and trust, Yefimov began to press Lonetree for information. This pressure eventually succeeded and Lonetree started on his downward spiral into the world of espionage. The author's interviews with Violeta's mother, sister, Yefimov, and other KGB operatives, as well as his contacts with Violetta herself, complete this intriguing story.[2]

Mr. Barker's book reflects his overwhelming amount of research. He relies on hundreds of comprehensive interviews with the key persons involved—from Clayton Lonetree and Uncle Sasha to the Marine trial attorneys, the CIA, the State Department, and the NCIS. With no formal experience in the military legal or intelligence communities, he spent countless hours familiarizing himself with these complicated worlds.[3] Included in this endeavor was a move from his home in New Mexico to Washington, D.C., and a trip to Moscow, to better acquaint himself with his subject matter.[4]

This story could not have been properly investigated immediately following Lonetree's trial because, until now, the information needed for the inquiry was simply unavailable. Classified documents remained classified and the Soviet Union remained behind the iron curtain. However, during the ensuing years, documents became accessible and the Russians opened their doors to United States journalists. Without these opportunities, Mr. Barker would have been unable to create a balanced work. In the author's words, "some books require the passage of time before a comprehensive study can be fruitful."[5]

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[2]The author's interview of Yefimov is especially interesting as it paints a vivid picture of the Cold War mind set of a KGB operative. According to the author. the KGB operatives were professionals who had a firsthand account of the nepotism that undermined the Communist Party in the late 1980s. It was their resentfulness toward the party which allowed them to speak so candidly with the author. Telephone Interview with Rodney Barker, author of *Dancing with the Devil; Sex, Espionage and the U.S. Marines: The Clayton Lonetree Story* (Jan. 15, 1996).

[3]*Id.*

[4]*Id.*

[5]*Id.*

Mr. Barker felt that the time was right to give the public a 360 degree understanding of the Clayton Lonetree story before it faded to another footnote of Cold War history.[6] To this end, he has crafted an absorbing examination into a fascinating case of espionage. His book is a well-written study of a complicated and fascinating subject that will appeal to both the military and civilian reader. Equally entertaining and educational, I highly recommend it.

[6] *Id.*

THE CLASS OF 1846, FROM WEST POINT TO APPOMATTOX STONEWALL JACKSON, GEORGE MCCLELLAN AND THEIR BROTHERS*

REVIEWED BY MAJOR SHAWN SHUMAKE**

In **1864,** George McClellan returned to West Point, his alma mater, to dedicate a monument to Union officers and enlisted men who had died during the Civil War. McClellan spoke of West Point, "with her large heart," who "adopts us all — graduates and those appointed from civil life, officers and privates. In her eyes we are all her children. . . . Such are the ties which unite us together, the closest of the sacred brotherhood of arms."

One year before the first shell glided over Charleston Harbor and ripped into the parade field of Fort Sumter, South Carolina, nearly eight of ten officers in the Army were West Point graduates. Up to that point none were general officers, but that would soon change as the Civil War provided a fertile, blood-soaked path to high command. John C. Waugh's book, *The Class of 1846, From West Point to Appomattox: Stonewall Jackson, George McClellan and Their Brothers,* chronicles this journey through a highly readable account of the sacred brotherhood to which McClellan referred. In doing so, the author focuses on what he describes as arguably the most illustrious class of the Academy's antebellum years, a class of fifty-nine that by the end of the Civil War had produced seventeen general officers.[1]

The Class of 1846 breathes humanity into well-known historical figures such as George McClellan, Thomas "Stonewall" Jackson, George Pickett, and A.P. Hill. Waugh brings them to life more as individuals with their own strengths and weaknesses, their own

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*JOHN C. WAUGH, THE CLASS OF 1846, FROM WEST POINT TO APPOMATTOX: STONEWALL JACKSON, GEORGE MCCLELLAN **AND** THEIR BROTHERS.

**Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1]The author includes two additional officers in the class of 1846 who became general officers but who are not included in the number of general officers quoted in the text of this review. These two officers, Confederate Lieutenant General **A.P.** Hill and Union Major John Gibbon began with the class of 1846 but graduated in 1847. A third officer, Birkett Fry, became a Confederate brigadier general, although he was dismissed from the Academy.

hopes, dreams, and ambitions, than as simply the commanders in charge of certain military campaigns. Waugh also introduces lesser-known personalities. John Foster Gray, Darius Couch, William Montgomery Gardner, Jesse Reno, George Stoneman, and others shared the same four years overlooking the Hudson; in the next twenty years their lives were often intertwined with their more famous classmates, sometimes as allies, but often as mortal enemies.

Waugh uses the historical backdrop of the Mexican War, the Indian Wars of the 1850s, and the Civil War as the stages on which the members of the class of 1846 lived and died. He provides snap shots, not always chronologically ordered, of some of the major conflicts of these three wars. The reader hoping to gain a full tactical understanding of any the three wars will be disappointed, although not surprised. Waugh makes clear in an introductory chapter, and in the book's foreword by James M. McPherson, that he is telling a story about certain individuals, individuals bound together in a common brotherhood of arms.

The book contains no maps, making, for example, Jackson's Valley Campaigns difficult to follow, especially for the reader not intimately familiar with the geography of the Shenandoah Valley. Likewise, *The Class of* 1846 would not prepare one for a staff ride to Antietam or Gettysburg, although Waugh recounts certain parts of these battles and the exploits of the members of the class of 1846 who figured prominently in them. From this book, the reader might infer that no members of the class of 1846 ever fought west of what is now West Virginia or south of Virginia. Nevertheless, Waugh's omission of many important battles and campaigns does not distract from his gripping story of human drama as the class of 1846 struggled with life, love, and all too often, untimely death.

Waugh opens by moving swiftly through each of the four years of West Point, introducing the brotherhood and binding them together with a strong foundation of common experiences and shared academic and disciplinary hardships. Using informal language and amusing tales of everyday life at West Point, Waugh lays a strong foundation of common academic trials such as the cadets' requirement to work and to defend problems at a blackboard while subject to the questions of their professors. Even those who never experienced such public academic humiliation will feel the discomfort as the fledgling cadets struggle with a "frightening new fact of life . . . that penetrated cadet ignorance . . . as incisively as Socrates had disrobed sloppy reasoning in Athens." On the lighter side, Waugh paints an interesting picture of stag dances that were "rather a dry business without ladies,'' although the possibility that Jackson may have once danced the two step with McClellan or A.P. Hill is quite intriguing.

As the class of **1846** graduated, McClellan (who arrived with much promise, having already completed two years of study at the University of Pennsylvania) finished second in the class. At dead last fell George Pickett, one of those cadets who seemed to have a "magnetic attraction for demerits, [which] flew . . . from every direction and stuck . . . like lint." Jackson finished seventeenth, having moved up every year. He had won the respect of his classmates who appreciated his resolve and noted that "if we stay here another year, Old Jack will be head of the class."

Within months of graduation, war with Mexico erupted and West Point graduates were in demand. Waugh recounts the adventures of the class of **1846** as they fought in successive battles from Vera Cruz to Mexico City. He tells of amusing ways to deal with battlefield discomforts, such as McClellan's ingenuous invention to ward off blood thirsty fleas.

In a more serious vein, Waugh describes the attack on Chapultepec, "a forbidding eminence jutting **150** feet upward on a massive outcropping of phosphoritic rock, so situated as to command every entrance to [Mexico] City." As always, through the eyes and words of the class of **1846,** Waugh lays out riveting vignettes of war.

A "who's who" of American military history contributes to a stunning victory: General Winfield Scott called on his West Point engineers, including R.E. Lee (class of 1829), McClellan, and one of McClellan's classmates, John Gray Foster, who would later courageously defend Fort Sumter and eventually be promoted to the grade of major general.

Jackson, in charge of an artillery battery, engaged in a virtual muzzle-to-muzzle battle with the Mexicans. The smell of gunpowder almost rises from the pages as Jackson successfully exhorts his cowering troops to action by personally dragging one of his guns into place amid heavy fire.

In a flanking assault that followed a route chosen by the engineers, George Pickett, who was last in his class, was the first soldier to breach the walls of Chapultepec and carry the American flag into the stronghold. Interestingly, Pickett grabbed the flag from a wounded Lieutenant James Longstreet. Longstreet himself had taken up the flag when Mexican gunfire had stopped Lieutenant Lewis Armistead. Amazingly, all three would fight together again at Gettysburg.

The class of **1846** acquitted itself well during the Mexican War. Fifty three went. Two were killed. Thirty-seven received brevet promotions for gallantry. Jimmy Stuart, one of McClellan's close

friends and his roommate his third-class year, was breveted twice. During the entire war, few persons received three-brevet promotions. Not surprisingly, one of those was a member of the class of 1846: Thomas Jackson. Waugh noted the "crucible of battle seemed to exalt him. The hotter it got the better he liked it." Several of Jackson's former classmates would painfully discover this in the coming years.

After a brief look at the service of several members of the class during the Indian Wars, Waugh depicts **a** tenacious George McClellan, engaged in a battle of the heart. This battle would indirectly pit him against a former classmate and future battlefield opponent, A.P. Hill. In a protracted effort to win the heart of Mary Ellen Marcy, McClellan at first lost her to Hill. McClellan later regrouped for a successful campaign to win her love after Marcy's father forcefully objected to her engagement to Hill. However, McClellan's friendship with Hill was not damaged by this rivalry, and when McClellan and Marcy were married, Hill attended.

Waugh's initial picture of a tenacious McClellan, a hero from the Mexican War, contrasts sharply with the hesitant, tentative McClellan who emerged when Lincoln called him to Washington to save the Union in July 1861. McClellan had just won three minor skirmishes in western Virginia.

Waugh notes that McClellan was a man of extraordinary charm who had dazzled his West Point classmates, a man his critics said could strut while sitting down. McClellan possessed inexhaustible energy and had the unquestionable ability to bring order out of chaos. McClellan was a superb organizer. Soon he whipped the Army of the Potomac into what Waugh calls "the most impressive and disciplined military machine ever assembled on the North American continent."

Unfortunately, McClellan was unwilling to unleash the full fury of his military machine against the vastly undermanned Confederate forces at Manassas, Yorktown, and Sharpsburg. Instead he sent his troops into battle piecemeal, or not at all. Waugh uses a series of letters between Lincoln and McClellan and between McClellan and his wife to painfully and painstakingly support the judgment of history that as a high commander, McClellan failed miserably. The contempt bordering on insubordination that McClellan expressed about Lincoln in these letters will not win him any new support or sympathy. In one letter to his wife, McClellan describes Lincoln as little more than a "well meaning baboon."

Whereas McClellan failed to live up to his status as the "boy wonder" of the class of 1846, Thomas "Stonewall" Jackson continued

to overachieve. Waugh paints a compelling picture of a peculiar, taciturn man, thoroughly devoted to his God and thoroughly devoted to the utter destruction of any hostile army upon which he set his sights.

Waugh omits Jackson's involvement in the first battle of Manassas but focuses at great length on his Valley Campaigns. Waugh also recounts a lesser-known, but telling, story of Jackson's brilliant trick at Harper's Ferry at the outset of the war that allowed him to capture a large number of locomotives supporting the Union war effort. After capturing the locomotives, Jackson boldly dragged many of them by horse through the Shenandoah Valley to a place where they could be refitted and requisitioned for the Confederate cause.

Waugh highlights a number of Jackson's quirks and eccentricities. These add personality and humanity to Jackson, which are sometimes lost in more strategically grounded and less personality based chronicles of the Civil War. For example, Waugh notes that many times Jackson's men saw him on the battlefield with his right arm raised ramrod straight to the sky. Knowing him to be a religious man, they assumed this was a form of supplication to God. Actually Jackson believed his right arm weighed more than his left. This gesture was his attempt to relieve the excessive weight by having the blood run down his arm and back into his body.

The humanity that Waugh brings to Jackson surfaces most compellingly in the pages describing Jackson's wounding and death at the hands of his own troops. Even while being carried from the battlefield mortally wounded, Jackson's concern was with others who were also wounded and with his wife. Jackson expresses no concern that he may be captured by Union soldiers who were within shouting distance. He explains that he treated their prisoners with dignity and respect and knows that they would treat him no differently.

Waugh's decision to devote more pages to Jackson's wounding and death than to the battle of Chancellorseville itself is consistent with the book's focus, and, most importantly, it works. Even readers hailing from north of the Mason-Dixon line may find themselves hoping that history has lied and that Jackson did live to fight again.

Although Waugh characterizes the class of 1846 as arguably the most illustrious of the antebellum years, he does not make any comparisons with other classes. The reader only knows that the class of 1846 was the largest of its time. The many general officers who emerged from the class might simply be due to fortuitous timing. The Mexican War provided combat experience for virtually the entire class. Who better to call upon when the country split in 1861?

Nonetheless, the class of 1846 left an indelible mark on history. Jackson's presence alone would allow good room to argue the case for his class, but this is not really Waugh's point. Waugh too well chronicles the failures of the class to view his book as simply the story of the best or most illustrious class of West Point. He concludes that McClellan "failed in nearly every measure of what a general ought to be." Furthermore, for all the battles in which a member of the class of 1846 emerged victorious, a defeated classmate was usually not far away.

Waugh writes "there could have been a class reunion on the banks of the Antietam if the times had not been so troubled." The importance of ***The*** *Class of 1846,* however, centers around another class reunion, one that took place in Appomattox. Waugh notes "in the end West Point's finest hour came not on a battlefield but at a peace table." As many members of the class of 1846 met outside the Appomattox courthouse, Grant and Lee set out to heal the scars of a torn nation. Waugh quotes Morris Schaff, class of 1862:

> [Grant and Lee] met with more at stake than has ever fallen to the lot of two Americans to decide. On the manner in which they met, on the temper with which they should approach the mighty issue, depended the future peace of the country and the standards of honor and glory for the days to come. . . . Those two West Point men knew the ideals of their old Alma Mater. . . . [West Point's] greatest service was in inspiring and revealing the ideals of the soldier and the gentleman, and in knitting friendships which, when called on by the world's love of gentleness, responded at Appomattox by bringing back enduring peace.

Ultimately, ***The*** *Class of 1846* exalts shared ideals of honor, compassion, and, ultimately, brotherhood, over victory on the battlefield. This was the legacy of West Point, not just the legacy of a single class.

ROBERT E. LEE: A BIOGRAPHY*

REVIEWED BY MAJOR TARA O. HAWK**

Emory M. Thomas has the courage to tackle a subject that has been covered brilliantly and authoritatively by many historians and biographers — the life of Robert E. Lee. Thomas, a University of Georgia history professor and preeminent modern-day Civil War historian,[1] succeeds in providing us with a fresh and remarkably human look at Lee, the man.

While Douglas Southall Freeman gave us the definitive four-volume *R.E. Lee: A Biography*[2] that deified Lee as the perfect military hero, saint, and noble image, Thomas probes into the human dimension of Lee's character and reveals both his strengths and weaknesses. Yet Thomas's portrayal of Lee's shortcomings does not approach the so-called revisionist histories of Lee, popular in the 1970s and 1980s. That class of work, exemplified by Thomas Connelly's *The Marble Man: Robert E. Lee and His Image in American Society*,[3] sought to completely debunk the Lee myth and show him as a troubled and frustrated person consumed by his own failures. Instead, Thomas seeks the truth which lies somewhere in the middle of these two extremes. In what he describes as a "post revisionist" biography, Thomas provides a balanced portrait of a man capable of great deeds but nevertheless susceptible to the same human weaknesses faced by us all. "History needs Robert E. Lee whole," Thomas writes in his opening, and that is exactly what he gives us.

Thomas traces Lee's life in a chronological narrative that emphasizes those early experiences that shaped his character rather than the later, more historic events, which thrust Lee's already-

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*EMORY M. THOMAS, ROBERT E. LEE: A BIOGRAPHY (W.W. Norton & Co. 1995); 472 pages, $30.00 (hardcover).

**Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1]Professor Thomas's other books include: *The Confederacy as a Revolutionary Experience; The Confederate State of Richmond: A Biography of the Capital; The American War and Peace, 1860-1877; The Confederate Nation, 1861-1865; Bold Dragoon: The Life of J.E.B. Stuart;* and *Travels to Hallowed Ground: a Historian's Journey to the American Civil War.*

[2]DOUGLAS S. FREEMAN, R.E. LEE: A BIOGRAPHY (1934-35) (four-volume set).

[3]THOMAS L. CONNELLY, THE MARBLE MAN: ROBERT E. LEE AND HIS IMAGE IN AMERICAN SOCIETY (1977).

established character to the forefront. The reader does not reach the Civil War until the middle of the book and, even then, Thomas uses it as a mere backdrop to explain Lee's inner person. The focus always remains on Lee, and readers who expect detailed digression into Joshua Chamberlain's heroism at Gettysburg or Stonewall Jackson's audacious flanking maneuver at Chancellorsville will be disappointed. Thomas remains true to the focus of his book with sixteen pages of black-and-white photographs of Lee, his family, and their various homes; none of the pictures shows Lee at war or in the company of other generals and leaders. In total, what emerges is a Lee who is much more than a great military officer, but a Lee who is human and understandable.

Robert Edward Lee was born into a prominent Virginia family, the last child of Ann Hill Carter and the Revolutionary War hero Lighthorse Harry Lee. The book opens with the wedding of his parents at the stately James River plantation, Shirley. Despite his fortunate birthright, his gallantry during the War of Independence, and his close affiliation with George Washington, Lighthorse Harry Lee was an irresponsible man. He squandered the family's wealth and was imprisoned for over a year for his failure to pay his debts. He subsequently fled to the West Indies, abandoning his family and causing Robert Lee to become the head of the household in early adolescence. Robert Lee's brother, Black Horse Harry Lee, scandalized the family further by engaging in an adulterous affair with his sister-in-law. Thomas devotes so much time on Lee's brother and father to explain his sense of shame and embarrassment over their lack of self-control and restraint. Lee would spend the rest of his life emphasizing those virtues in himself and Thomas describes this preoccupation as Lee's "birth defect." His mother's puritanical and pious beliefs only fueled this character trait.

Lee entered West Point and thrived on the disciplined, ordered, and measured cadet life. He graduated second in his class and, more tellingly, survived four years at the Academy without incurring a single demerit, thus earning him the moniker at an early age as the "Marble Model." Professors described him as compulsive for perfection and obsessive in his quest for control. After his commissioning in the Corps of Engineers, he soon married Mary Custis, the daughter of Martha Washington's grandson.

According to Thomas, Lee's marriage was "safe and acceptable" although never more than merely satisfactory to either partner. The normally calm and nonconfrontational Lee frequently criticized his wife's inadequate housekeeping skills. In her later years, Mary became an invalid and stayed at Arlington, Virginia, with her parents for long periods of time. Even though Lee and his wife raised

seven children together, Lee searched for emotional attachment through a series of flirtatious letters with young women, "forming special friendships with some of them." This need for female companionship is perhaps the most surprising element of Lee's personality that Thomas portrays.

In writing to one of his more intimate female friends the day after her wedding, Lee displays his bawdy side when he asks her "[A]nd how did you disport yourself My Child? Did you go off like a torpedo cracker on Christmas morning?' Thomas does not suggest that Lee was ever physically unfaithful to his wife. Instead, Thomas gives us these heretofore seldom-read letters because in them Lee reveals so many thoughts that he never disclosed in conversation or in official documents. In some of his other letters, Lee admits his self-perceived inadequacies and reveals himself as an insecure man, something he would never disclose in public.

The use of these letters, along with memoirs, recollections, and other primary sources is now recognized by Civil War historians as the preeminent means of historical fact gathering. Although Professor Thomas's research and use of secondary sources is notable for its breadth, his superb use of these first-hand accounts is what brings Lee's story to life.

In the letters to his women friends, his children, and his former instructors at West Point, Lee is shown as a man absolutely devoted to duty and overwhelmingly in control of himself—and others. We discover his extreme desire to avoid confrontation and conflict in both his personal as well as professional life. Thomas shares the view of many historians that Lee's aversion to conflict was his greatest weakness as a military commander. This fierce battlefield commander, lionized particularly in the South for his bravery and courage, actually shrank from confrontation at every opportunity. Thomas blames this character trait for Lee's attempt to build consensus at Gettysburg rather than asserting rank and demanding the obedience of his subordinates who disagreed with his plans. Very fairly, however, Thomas does not dwell on nor blame the South's defeats on this element of Lee's character. He appropriately credits many of Lee's better qualities such as his audacity and aggressiveness for victory on the battlefield. He also recognizes that while Lee's hands-off approach with his subordinates may have led to disaster in Pennsylvania, it worked splendidly with a lieutenant such as Stonewall Jackson who thought as Lee did and who could carry out Lee's vision.

Thomas traces Lee's military career from his assignments in the Mexican War under General Winfield Scott to his command of

the Army of Northern Virginia, but these military accomplishments never become the focus of the book. Instead, Thomas shows us the human Lee, a man who allowed his children to tickle his feet as he told them bedtime stories, a man who wrote adoring letters to his friends and to his children, and a man who turned down more lucrative business offers after the Civil War to become president of the obscure Washington College in Lexington, Virginia. The years between the War and Lee's death in 1870 were marked by personal losses such as his unsuccessful attempt to regain his citizenship, the death of a daughter and two grandchildren, and his own rapidly failing health. But in the end, as he had done throughout his life, Lee overcame his share of failure for himself, and the South, to achieve success.

The theme of the book is the balance between Lee's self-control and his search for freedom, between what he "wanted to do" and what he "ought to do." Thomas argues that the Civil War gave Lee the opportunity to find the freedom he sought while also performing his duty. Thomas writes, "Lee was a great person, not so much because of what he did (although his accomplishments were extraordinary); he was great because of the way he lived, because of what he was." He was able to overcome many childhood wounds and personality limitations to achieve greatness. Lee wrote late in life to his daughter that he "was always wanting [lacking] something." Thomas recognized this rare insight for what it is—a revelation that Lee knew the boundaries of the human condition, yet he more often than not transformed "adversity into advantage." As Lee once wrote to his son, "Live in the world you inhabit. Look upon things as they are. Take them as you find them. Make the best of them. Turn them to your advantage."

For those who have always thought of Lee as an icon or a mystic figure that cannot be fully understood, this book shows Lee as a man who is to be followed rather than worshipped. It shows a man whose life should not be immortalized, but emulated. In becoming more human and possessed of both strengths and weaknesses, Lee becomes more attainable. We can realistically strive to be more like him. As Thomas said, "Lee was not word, he was deed," and by understanding the person behind the deed, it increases our own capacity for "deeds" both great and small. For anyone whose regard and admiration of Lee is based only on his generalship and military exploits, I highly recommended this book. One's respect and esteem for him can only increase because of knowing Lee the man.

SHROUDS OF GLORY*

REVIEWED BY MAJOR SAMUEL D. HAWK**

Shrouds of Glory takes the reader through the Civil War's Tennessee Campaign during the Autumn of 1864. This campaign began with high, almost desperate, hopes on the part of General John Bell Hood, commander of the Confederate Army of Tennessee (as opposed to the Union Army of *The* Tennessee), and ended with utter failure and retreat. Author Winston Groom has written the story of a furiously fought campaign from a Southern point of view. He delves into the Southern soldier's character and motivation, and does not flinch from the ugliness of battle or the campaign's ultimate futility. At its core, *Shrouds of Glory* is the story of the men who fought the battles — the few who survived and the many who died. It is not a book about the glories of war, but about its grimness and death, death cloaked "in a shroud of glory."[1]

In September 1863, Atlanta was lost and General William T. Sherman was pursuing General Hood in North Georgia. Hood realized the folly of turning to fight Sherman's much stronger and better-equipped army, so he conceived a plan to turn north and march away from Sherman and into Tennessee. Union General Scofield's Army of The Ohio was on the march to link up with the Army of The Tennessee in Nashville, commanded by General George Thomas. Hood's plan was to destroy Scofield's force, then capture the Union stronghold of Nashville. From there, he would move north through Kentucky, recruiting Southern sympathizers on the way, and threaten Cincinnati, Ohio. In Hood's mind this became a grand plan to win the war. There was an ongoing Presidential election in the North, and there was increasing sentiment for a negotiated settlement. A growing, victorious Confederate Army slashing its way north to Ohio could cause Lincoln to lose the election and finally bring formal recognition of the Confederate States of America from France and England. The victorious Confederate Army of Tennessee would come up behind

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*WINSTON GROOM, SHROUDS OF GLORY: FROM ATLANTA TO NASHVILLE: THE LAST GREAT CAMPAIGN OF THE CIVIL WAR (Atlantic Monthly Press 1995)

**Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1]The title of the book was inspired by the following quote from Jean-Paul Satre: "I have buried death in a shroud of glory"

General Ulysses S. Grant's force besieging General Robert E. Lee at Richmond, Virginia, defeat Grant, and allow the combined Armies of Tennessee and Northern Virginia to march on Washington, D.C., winning the war.

Hood marched his army out of Georgia and Sherman quickly turned his attention south to his planned March to the Sea. He left Hood to Thomas, offering him no support of any kind. Jefferson Davis was skeptical about Hood's plan, but with the Confederacy falling apart, he was glad to see someone engaging the enemy. Thus, Hood began his ill-fated journey.

Hood's and Scofield's armies clashed at Spring Hill, Tennessee, on November **29,** a day of missed opportunities for the Confederates. There was no all-out assault on the Union forces because of a series of mistakes, disobeyed orders, and, Groom surmises, drunkenness on the part of some commanders (Groom notes that Middle Tennessee is whiskey country). Hood awoke the next morning expecting to engage the enemy, but instead found nothing but smoldering campfires. Scofield's army had simply left and continued on its way to Nashville.

The Confederate Army of Tennessee pursued Scofield and the two armies met at the bloody Battle of Franklin. This furious battle resulted in thousands of casualties and, in the end, Scofield held off Hood's advance. Then, as at Spring Hill, the Union force simply pulled out and continued on its way. Hood suffered heavy casualties and accomplished nothing. Scofield made it to Nashville, reinforcing the already strong Union forces there.

The two armies faced each other at Nashville on December 15. The battle was a terrible defeat for the Confederates, who retreated in total confusion. They began a mournful march out of Tennessee, through Franklin and Spring Hill, passing the bodies of their slain comrades now frozen in snow and ice. Hood's army crossed into Alabama at about the same time that Sherman reached the sea at Savannah.

Winston Groom is a well-known novelist, and some of his previous books, such as *Forrest Gump* and *Better Times Than These,* examined recent history through the lives of fictional characters. *Shrouds of Glory,* his first foray into Civil War history, delves into the lives and characters of the people who lived the story. Groom purposely avoids the use of footnotes, because he feels that they would intrude on the narrative flow. He asks the reader's forgiveness for this, notes in the preface that he scrupulously researched the book, and adds bibliographical notes at the end. This is not a book for academics doing scholarly work, although the depth of Groom's research is clear in the vivid details. It is a beautifully

written story of epic events brought to human scale.

The main character is Confederate General John Bell Hood, and the reader learns a great deal about his life, motivations, and even his love life. Groom paints a sympathetic picture of Hood as a man of integrity, plagued by personal demons. He makes much of Hood's on-again, off-again romance with aristocratic South Carolinian Sally "Buck" Preston. They were engaged, but never married, mainly because of her parents objections to his lack of refinement.

Hood is obviously a hero of Groom's, but Groom's view of him is not one dimensional. He assesses failure and places blame where it is due. In one particularly interesting passage describing the aftermath of the Battle of Franklin, Groom elicits sympathy from the reader by describing Hood as crying "like a child" from remorse and he quotes local women remembering how sad he looked.[2] In the next paragraph, Groom bluntly hits the reader with the realization that "Hood had not only accomplished 'nothing,' he had in fact wrecked his army" at FranMin.3

Groom gives illuminating background on other major players in the story as well. The reader learns about their effectiveness as soldiers and about their lives before and after the War. Many of the officers in the campaign had been attorneys before the War. Among them were General Edward Walthall, a former Mississippi District Attorney; General John Carter, educated at the University of Virginia; and a Harvard-educated South Carolinian whose name sums up the lost cause, General States Rights Gist. Groom describes Confederate General Benjamin Franklin Cheatham as a wicked man, a better fighter than general, whose supposed drunkenness played a major role in the missed opportunities at Spring Hill. Union General George Thomas was a Virginian whose family never forgave him for siding with the Union.

Groom is a native of Alabama, and his Southern partisanship is apparent, especially in his treatment of General Sherman. Groom devotes many pages to making clear his opinion of the General, even though Sherman did not participate in the Tennessee Campaign, and is only a minor player in the book. Any Northerner who wonders at the lingering hatred many Southerners feel for Sherman need only read *Shrouds of Glory*. Groom chooses his words carefully to create a menacing profile. He speaks of Sherman's "first taste of control over civilians" and his "stony harshness tempered by a chilling logic" when his division occupied Memphis and burned Randolph, Tennessee.*

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[2] GROOM, ***supra* note*,** at **215.**

[3] *Id.* at 216.

[4] *Id.* at 87.

These were the first of Sherman's "pyromaniacal urges in connection with Southern civilians and property," but they were not his last.[5] Groom uses Sherman's own words to condemn him, and makes him seem supremely arrogant. Sherman widely published a letter warning Southerners to "prepare for my coming," threatening all men and women with death and dispossession of their lands and property.[6] His goal was the total subjugation of the South, and he said that the Union Army would "take every life, every acre of land, every particle of property, everything that to us seems proper . . . and we will not account to them for our acts."' He felt that the only way to save the South for the Union was to destroy it. Groom describes Sherman's March to the Sea by saying "Not since the Depredations of Attila the Hun and the Duke of Alva had such an adventure been conducted in Western civilization."[8]

Groom has a Southern writer's sense of place and his descriptions of the towns and countryside almost make them characters in the story. He poignantly describes the beauty of Franklin before the battle, and its near-destruction within hours. His descriptions of Nashville before and after Union occupation border on the melodramatic and almost make the city seem like paradise found and lost. Most effectively, he describes the Tennessee soldiers' deep feelings of reverence and pride to be fighting on their native soil.

Although *Shrouds of Glory* is a book about epic events, *Groom* never forgets those individuals who fought and he makes liberal use of contemporary accounts. He quotes letters and memoirs from such well-known chroniclers of the war as Sam Watkins and Mary Boykin Chestnut, and from lesser-known soldiers and civilians with important contributions to make to the narrative. Groom's descriptions of the battles are vivid and gory. He describes the height of the Battle of Franklin as a "cauldron of flame-stabbed smoke and dust and racket."[9] He uses no-holds-barred contemporary descriptions of splattered brains and severed limbs, such as this memory from a Confederate captain: "[O]ne Union colonel saw a Confederate run one of his men through with a bayonet, but before he could pull it out, "his brains were scattered on all of us that stood near.'"[10] Groom describes the dead chewing their thumbs to pulp as they died in agony,[11] and the Confederates' "Moscow style"[12] retreat through the

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[5] *Id.*
[6] *Id.*
[7] *Id.* at 93.
[8] *Id.* at 112.
[9] *Id.* at 188.
[10] *Id.* at 189.
[11] *Id.* at 211.
[12] *Id.* at 210.

snow to Alabama, the unshod leaving bloody footprints in the ice.

Winston Groom has created **a** compelling account of the last great campaign of the Civil War. It is an excellent book for anyone who ever wondered why Southerners fought and about their tenacity even while the Confederacy was in its death throes. It is the story of common men swept up in **a** great struggle and as the author describes it, "when they were gone, their dust enriched the national trust."[13]

[13] *Id.* at **292**

IN THEIR OWN WORDS, CIVIL WAR COMMANDERS*

REVIEWED BY MAJOR CURTIS A. PARKER**

> On 6 June 1944, as the allied forces began the invasion of Normandy, General George S. Patton, Jr., wrote to his son, then a cadet at the United States Military Academy, that "to be a successful soldier, you must know history." The number of similar pronouncements from noted military figures, including Napoleon, is almost endless and the basic refrain is the same—to understand the present and to prepare for the future the study of history is vital. This applies most particularly to those who lead men in battle. As Marshal Foch wrote, "no study is possible on the battle field, one does simply what one can in order to apply what one knows.'' Despite vast changes in technology since World War II, the combat leader may still learn much from the study of past battles and campaigns. Weather, terrain, and intelligence are as important today as in the days of Alexander, Frederick the Great, and Napoleon; human reactions in combat remain relatively constant.[1]

This initial paragraph from the preface to A *Guide to the Study and Use of Military History* stresses the importance of the study of history to the professional soldier. A soldier can learn much about leadership in war from those who have commanded in battle. T.J. Stiles's compilation of writings of fourteen Civil War commanders, *In Their Own Words, Civil War Commanders,* is an opportunity to learn from such men.

In his preface, T.J. Stiles, writer and historian, states that his goal was to create a narrative, chronological history of selected Civil

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*T.J. STILES, IN THEIR OWN WORDS, CML WAR COMMANDERS (New York: The Berkley Pub. Group 1995); 327 pages, $14.00 (softcover) (with an Introduction by Gary W. Gallagher, Head of the History Department, Pennsylvania State University).

**Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1]JOHN E. JESSUP, JR. & ROBERT W. COAKLEY, A GUIDE TO THE STUDY AND USE OF MILITARY HISTORY, xi (Washington, D.C.: Center of Military History, United States Army, 1979).

War battles told in the words of the commanders who fought them. He was successful.

The work is not inclusive, nor was it designed to be. Stiles realized that to create such a work would have gone well beyond one volume. He subjectively chose the battles based "primarily on the decisiveness of the events, the importance of the writer, and the literary quality of the story."

The work is comprehensive. Stiles bridges the gaps between battles with brief, detailed descriptions of intervening events. He analyzes the effect of the outcome of the battles on the mood of politician and citizen alike. He provides the continuity required to allow the reader to understand each battle's context in the war. However, while addressing the social and political impact of each battle, Stiles never loses sight of the battlefield. The commanders tell their story of the war in styles as varied as the commanders themselves. Through their own words they "share their thoughts and observations, and make historical events personal, intimate, and real."

The first-hand account is both the primary strength and weakness of the book. The commanders,[2] while providing excellent battlefield accounts, wrote with the clarity of hindsight and often with an eye towards one's own place in history. However, both Stiles and

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[2]The commanders and their positions at the time were as follows:

Union:

George B. McClellan, Commander of the Army of the Potomac (1862)

U.S. Grant, Commander of the Army of the Tennessee and later Commander-in-Chief of the Union Armies

William T. Sherman, commander of a brigade at First Bull Run and later Commander-in-Chief in the West

Philip H. Sheridan, commander of an infantry division and later Commander-in-Chief of the Cavalry of the Potomac

David D. Porter, second-in-command to Farragut at New Orleans

S. Dana Greene, Executive Officer (second-in-command) on the *U.S.S. Monitor*

Confederate:

P.G.T. Beauregard, Commander of the Confederate Army at Manassas

Joseph E. Johnston, Commander-in-Chief in Northern Virginia, later Commander-in-Chief in the West during the Vicksburg Campaign, and Commander of the Army of Tennessee during the Atlanta Campaign

James Longstreet, commander of a division and later a corps under Robert E. Lee in the Army of Northern Virginia

John B. Hood, Commander of the Army of Tennessee after Johnston

John S. Mosby, Commander of the Partisan Rangers in Virginia

John McCorkle, scout for William C. Quantrill and later squad leader under guerrilla George Todd in Missouri

John McIntosh Kell, Executive Officer (second-in-command) under Captain Raphael Semmes on the *C.S.S. Alabama Johnston*

Professor Gary W. Gallagher well advise the reader of this weakness.[3]

Gallagher's introduction to the work sets the stage with commentary about the war. He admonishes the reader that some of the writings are self-serving. He draws the reader's attention to some of the worst offenders. However, as Gary Gallagher reminds the reader, "Their writings, however flawed by special pleading, constitute a valuable and enjoyable introduction to the operations that helped decide the outcome of the war."

Although the work is reasonably well balanced—with seven commanders representing each side—not every battle is presented from both sides. Among the more noted commanders are Generals Grant, Sherman, and McClellan of the Union Army and Generals Beauregard, Johnston, and Longstreet of the Confederacy. Notoriously absent is General Robert E. Lee since, as Professor Gallagher points out, he never published anything about his wartime role.

The work is chronologically organized. Stiles begins the work with a section called the "High Tide of the Confederacy." Generals Beauregard, Johnston, and Longstreet provide insight and detail of successive Confederate victories from the Battle of Bull Run, through the Peninsula Campaign, to Second Bull Run. The section ends with the Union victory at Antietam. General McClellan, representing the Union, consistently explains away defeat or rationalizes lost opportunities; most notably his failure to pursue the Confederate Army after his victory at Antietam.

Stiles similarly follows the war throughout the book. In the section titled, "The Union Breakthrough," Union Generals Grant and Sheridan and Confederate General Johnston account for the battles of Shiloh, Perryville, and Vicksburg. These men, with Stiles's commentary, make clear that both sides knew the importance of the control of the Mississippi River and saw it as a wedge that would split the Confederacy in two.

The commanders, especially Grant, provide vivid accounts of the battles from the victory at Shiloh, through the unsuccessful Confederate invasion of Kentucky, to the struggle for, and ultimate Union victory at, Vicksburg in July 1863. Throughout, Stiles compares and contrasts these actions in the West with concurrent actions in the East, allowing the reader to see these battles not as isolated events, but in perspective with the whole of the war.

General Longstreet provides a detailed, day-by-day account of

[3]Gary W. Gallagher **is** the Head of the History Department, Pennsylvania State University **(see** *supra* note *).

the three days at Gettysburg. Longstreet closely interacted with Lee. Through Longstreet's words the reader comes closest to Lee's own thoughts and motivations. By reminding the reader that Gettysburg culminated just one day before the surrender of Vicksburg to Grant, Stiles again places this most famous battle of the Civil War in its context with the rest of the war. These two simultaneous victories sealed the fate of the Confederacy.

Stiles makes an interesting choice in Longstreet as the narrator of Gettysburg. His proposal for defensive warfare at Gettysburg is in stark contrast to the frontal assault chosen by Lee. After the war, his critical writings of Lee's actions at Gettysburg and his shift toward republican and reconstruction politics made him a controversial, and often ostracized, figure in the post war South.

Stiles returns to the West in the fall of 1863 with the Union Army under siege in Chattanooga following its loss at Chickamuga. At this time General Grant, commanding all Union forces in the West, prepares the Army to break out from the siege. General Sheridan leads the break out with a tenacious attack up Missionary Ridge. Sheridan gives an excellent account of this battle that tosses the Confederate forces in the Cumberlands into retreat.

Grant's success in the West led to his promotion to General-in-Chief of the Union Armies. Grant details his strategy to concentrate force on the Army of Northern Virginia while General Sherman pushed toward Atlanta. Generals Sherman, Johnston, and Hood provide an excellent account of the flanking maneuvers, attack, defense, and counterattack of the Atlanta Campaign.

The commanders and Stiles remind the reader of the importance of this action. The capture of Atlanta in September 1864 drove into the heart of the Confederacy, severely limited its industrial capacity, and cleared the way for Sherman's drive to the sea. This action, as with the control of the Mississippi River, again cut the South in two.

Through Stiles's useful commentary and the words of Grant and Sheridan, the final section of the book, "Grant Goes East," describes the siege of Petersburg, Sheridan's raids through the Shenandoah Valley, and the Campaign at Appomattox. Grant's account of Lee's surrender at Appomattox is compelling and extremely humane. It is an excellent lesson in being gracious in victory.

Three other sections are particularly noteworthy; the two sections devoted to naval warfare and the one section on guerrilla warfare.

Control of southern ports and rivers was essential to the north-

ern war effort. Major southern rivers formed essential lines of communications for the movement of troops and supplies. They were as important as the railways. The South's agrarian economy relied heavily on exports to Europe. Its war effort counted on importing weapons and supplies from Europe. The status of the Confederacy and its hopes for recognition of sovereignty rested on its ability to maintain transatlantic communications.

The accounts of three battles describe Union naval operations. The executive officer of the *U.S.S. Monitor,* S. Dana Green, gives a vivid account of the battle of the ironclads, the *Monitor* and the *Merrimack,* in March 1862. Admiral David Porter gives a full and detailed account of the April 1862 battle for the control of New Orleans and the lower Mississippi River. Finally, Admiral David G. Farragut gives an excellent account of the August 1864 Battle of Mobile Bay. After these sections, the reader is fully aware of the importance of the maritime control of the Confederacy and the hard-fought battles to gain it.

The cruise of the C.S.S. *Alabama* from August 1862 to June 1864 accounts for Confederate naval action. The *Alabama,* until its sinking by the *U.S.S. Kearsarge,* captured or destroyed sixty-six Union merchant vessels in the Atlantic and Indian Oceans. Its executive officer, John McIntosh Kell, tells the story of the efforts and difficulty of the Confederacy in acquiring ships in Europe and of the success of the *Alabama* in disrupting Union shipping around the world.

Guerrilla warfare was as much a force multiplier in the Civil War as it is today. In Virginia, Colonel John Mosby was successful in raiding Union forces. Colonel Mosby provides insight into guerrilla operations through his account of one of his most famous exploits—the capture of Union General Stoughton, in bed, behind Union lines.

Missouri was a slave state, but never a part of the Confederacy. After two failed attempts by confederate forces to take Missouri, pro-confederate Missourians took to guerrilla warfare. Guerrilla warfare in Missouri was some of the most savage fighting of the war. John McCorkle, one of the guerrillas, gives the account of two guerrilla actions, the Lawrence Massacre and the Massacre and Battle of Centralia.

At the Lawrence Massacre, the guerrillas murdered the majority of the male population of Lawrence, Kansas, and burned the town. While McCorkle's version has only Union soldiers being killed, Stiles points out that the guerrillas hunted down the entire male population, civilian men and boys, and killed them in front of their families.

The guerrillas defeated a force of regular Union cavalry at the Massacre and Battle of Centralia. However, this was more than just a military victory. The guerrilla force routed, pursued, and killed all but fourteen of the 206-man Union force. Reportedly, Jesse James led the charge and personally killed the Union commander.

Throughout, maps—forty in all—supplement the commanders' accounts. They are all reproductions of period maps. While the majority of the maps are clear, legible, and very useful, some are of poor quality and little value. Undoubtedly, the reader will at times desire better maps to aid in understanding and following the detail provided by the commanders.

This work is not a sole source for the study of the Civil War, any particular commander or battle, or the politics of the period, nor was this Stiles's intent. Instead, the work "[b]rings together a group of carefully selected and edited writings from both North and South, ranging from the first battle to the last, giving the reader a chronological history of the war in the words of those who fought it." Stiles introduces the reader to the commanders' stories of the war. The work inspires the reader to further explore the writings of these and others who shaped the events of the Civil War. It is a recommended addition to any soldier's reading list.

STRENGTH FOR THE FIGHT— A HISTORY OF BLACK AMERICANS IN THE MILITARY*

REVIEWED BY MAJOR KEVIN D. JONES**

Strength for the Fight, A History of ***Black*** *Americans in the Military,* by Bernard *C.* Nalty is a must read for all military members. Add it to your personal library. Why? It is the best documented account of Black Americans in the military and the integration of all four branches of the military. At least one other reviewer agrees. He said "[Nalty] has . . . written what is simply the best as well as most readable one-volume comprehensive account of these [Black fighting men's] contributions throughout American history. . . ."[1] *Strength for the Fight* tells the story of Black Americans' experience in all branches of the military, from the colonial era to the present day. Nalty deals candidly and honestly with the military's treatment of Black service members by a segregated and desegregated military.

From the start, Nalty makes you want to read this book. For example, the second paragraph of the book reads:

> Helping defeat America's foes did not gain acceptance within the military. Traditionally, when the firing died away, no more than a token number of blacks remained in the ranks. Besides fighting the wartime enemy, black Americans faced a second and far more dangerous foe— racism, which sharply restricted their opportunities within the armed services and in civil society as well. The accomplishments of blacks in combat all but disappeared when examined through the distorting prism of white supremacy.2

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*BERNARD C. NALTY, STRENGTH FOR THE FIGHT—A HISTORY OF BLACK AMERICANS IN THE MILITARY (The Free Press 1986);440 pages, $22.50 (hardcover), $12.95 (softcover).

**Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 43d Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1]David K. Carlisle, *Strength for the Fight; A History of Black Americans in the Military by Bernard C. Nalty,* L.A. TIMES, June 15, 1986, at 5, **book** review section.

[2]*Id.* Mr. Carlisle's review of *Strength for the Fight* quotes part of the quote included here; however, I elected to include the full paragraph to provide a sample of Mr. Nalty's writing style.

Another reviewer commented that this book is "the soundest and best documented synthesis of Black American military history we have."[3] In addition to being well documented, *Strength for the Fight* reads like a novel rather than a history book. Nalty writes as if he is telling a story. However, you only have to look at the endnotes of each chapter to realize that he is telling the story of real people and events in United States military history.

Nalty is eminently qualified to write this book. He has over thirty years of experience as a historian for the United States Armed Forces.[4] When Nalty wrote *Strength for the Fight,* he was a historian with the Office of Air Force History.[5] Furthermore, "[t]he book reflects the scope and depth of personal knowledge and salutary insight Nalty has gained from his experience in co-editing (with Morris J. MacGregor Jr.) 13 volumes of documents published in 1977 as 'Blacks in the United States Armed Forces: Basic Documents.'"[6]

Strength for the Fight consists of twenty-one chapters that cover such subjects as service during colonial times, slavery, World War I, World War 11, the Korean War, and the Vietnam War. The endnotes following each chapter provide the reader excellent source material for further research. The book also contains a comprehensive index and bibliography. For example, the reader can use the index to look up specific military units, branches of the service, military justice matters, installations, battles, or individuals.

Any one who questions why we have an Equal Opportunity Program or goals for minority promotions should read this book. It gives the historical background for the military's Equal Opportunity Programs. *Strength for the Fight* identifies those who were for and against integration of the military services. It also tells who made integration a reality and describes the vast difference between integration policies and actual implementation.

Nalty also describes why the branches integrated and when. For example, we learn that the Air Force was the first to adopt an integration policy and practice, while the Army was the last. This book also documents the use of racial *quotas* by the military services to keep Black Americans out of the military and from becoming officers.

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[3]Russell F. Weigley, *The Right to be in Combat,* N.Y. TIMES, June 22, 1986, § 1. at 15.

[4]Allan R. Millett, *The Long, Slow March to Equality*, WASH. POST, Aug. 10, 1986, at 7, book world section.

[5]Weigley, *supra* note 3.

[6]Carlisle, *supra* note 1.

Today's news is filled with stories on whether it is time to put an end to affirmative action.' For those in the military that have the power to end or continue goals for minority representation and promotion, *Strength for the Fight* is a must read book. It tells from whence we came and may prevent us from traveling those unjust roads again. Consider this quote from one of the Senators involved in the affirmative action debate: "[W]e have to look back into our history and look deep into our hearts and remind ourselves that we have a great deal to account for and correct based on discriminatory policies of the past—policies that continue to this very day."*

Judge advocates will find this book enlightening. Nalty talks about the military justice system and its treatment of Black Americans. He describes a military justice system that hung Black deserters from the 9th Cavalry, but gave life imprisonment to white soldiers that committed the same offense. Using Nalty's index, judge advocates can read about other incidents that caused Black Americans and Black community leaders to question whether the military justice system really afforded justice to Black Americans. After reading *Strength for the Fight,* judge advocates may realize that some of the current procedures and regulations governing the administration of military justice are the result of the history in Nalty's book.

Nalty documents in an even-handed manner Black Americans participation in the armed forces.[9] He tells us about the heroic as well as the dishonorable actions of Black American service members. For example, Nalty writes of a Black American soldier, Corporal David Fagan, who in 1899 deserted from the 25th Infantry Regiment in the Philippines and later led Philippine rebels against American forces. In the same chapter, however, Nalty relates the battles fought and won by Black military units like the 25th Infantry Regiment.

On the negative side, one reviewer, while stating that *Strength for the Fight* is a "superb book that deserves wide attention," criticizes the book because it "sees everything that happen to Blacks in the armed forces as the product of institutionalized racism."[10] Another reviewer criticizes the book's treatment of the "Army's last black 24th Infantry Regiment in Korean combat."[11] He accuses

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[7] Steve Gerstel, *Affirmative Action: Debate Won't be Tame,* RICHMOND TIMES-DISPATCH, Mar. 19, 1995, at A6.

[8] *Id.* (quoting Sen. William S. Cohen, R-Maine).

[9] Drew Middleton, *Jim Crow in Uniform,* N.Y. TIMES, Aug. 23, 1986, § 1, at 12.

[10] Millett, *supra* note 4.

[11] Carlisle, *supra* note 1.

Nalty of failing to point out that the official record of the 24th Infantry's service in Korea only includes the initial three months of a fourteen-month tour.[12] The reviewer specifically accuses Nalty of failing

> to credit the 24th Infantry with what was actually the United States' highly significant initial victory over invading North Koreans, as well as this regiment's subsequent outstanding performance in northwesternmost (sic) North Korea in late 1950 and two extraordinary regimental assault river crossings in South Korea during early 1951.[13]

The reviewer that made this comment commanded the Army's last Black combat unit in Korea.[14]

In closing, it bears repeating that this is a must read book which should be on every judge advocates' reading list, if not in their personal library.

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[12] *Id.*

[13] *Id.*

[14] Even if this statement proves to be accurate, one might consider that the reviewer was perhaps too close to the subject matter. For example, David Carlisle concluded his review by stating "Nalty has, with but one important exception, his Korean War chapter, given us the work that has for too long been missing from the library of American military histories." *Id.*

THE ASHES OF WACO: AN INVESTIGATION*

REVIEWED BY MAJOR LEANNE BURCH**

The haunting memory of black smoke billowing from a sprawling Texas farmhouse is etched in the minds of most Americans. Beginning with the botched raid of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms (ATF) agents on Mount Carmel on February 19, 1993, the public emotionally followed the ensuing fifty-one-day siege. Pictures and stories of children, allegedly endangered by a crazed cult, were told by excited reporters. Illegal drugs and stockpiled weapons were rumored. These were mixed with verbal and visual images of the four ATF agents who were shot to death by Mount Carmel residents. All the events unfolded around Vernon Wayne Howell, also known as David Koresh, a self-proclaimed Messiah preparing his followers for the imminent Apocalypse foretold in the Book of Revelation. Seventy-six men, women, and children, known as Branch Davidians,[1] perished in the Apocalypse of April 19, 1993.

In ***The Ashes of Waco: An Investigation,*** author Dick J. Reavis notes that the media, the federal government, and even the President were quick to blame those inside the compound. Less quick to cast judgment, he personally began researching the events more closely following the deadly blaze. Published by Simon and Schuster in July 1995, the book's publication was speeded to coincide with the House hearings on Waco. This book differs from most other literary endeavors on the subject by providing great detail about David Koresh's theology and its ultimate earthly impact on his followers. It also provides narrative detail of the exhaustive negotiations between the Federal Bureau of Investigation (FBI) agents (who took over after the ATF raid), and David Koresh.

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*DICK J. REAVIS, THE ASHES OF WACO: AN INVESTIGATION (Simon & Schuster 1995); 320 pages, $24.00 (hardcover).

**Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

When Howell took over as leader at Mount Carmel, he "dispensed with the trappings of denominationalism — starting with the church name" The press called the residents Mount Carmel Branch Davidians because the ownership group on deeds to the property was the Branch Davidian Seventh-Day Adventist Association. ***See generally supra*** note *, at 85.

Dick J. Reavis initially covered the Waco incident as a staff writer for the newsweekly *Dallas Observer*. A former civil rights worker and staff member of the Southern Christian Leadership Conference, Reavis is a Nieman Fellow in Journalism and has been a Senior Editor at *Texas Monthly* and a Business Correspondent for the *San Antonio Light*. He has authored several books, including *Conversations with Montezuma and Fodor's Texas*. Questions, left unanswered by both lawmen and the Koresh followers after the fire, spurred his interest and he went to work fulltime on uncovering the answers. His work resulted in this book, as well as his participation as the opening panelist in the 1995 House hearings on Waco.

Reavis began his research intent on understanding the actions of those involved, with particular focus on the deeply-sown religious beliefs of the Mount Carmel community. His book draws from interviews with survivors of the movement,[2] published accounts, transcripts from the San Antonio trial of eleven survivors, and from various religious tapes and written materials. He also derived much of his book from 17,800 pages of "secret" transcripts of the telephone conversations between those inside Mount Carmel and government negotiators. Reavis almost smirks at his literary scoop, claiming these transcripts "may not be released to the public until the year 2000."

Mr. Reavis gained little direct insight from the lawmen's perspective, as few investigative government reports have been released, and many government employees remain under gag order pending lawsuits from survivors. This may help explain, though not forgive, his strong bias against government personnel and their activities.

In the early pages of the book, Reavis likens the people who had lived in Mount Carmel "to the Shakers and to the Oneida community — parts of today's Americana." He characterizes Koresh's followers as decent, hard-working people who deserved to be left alone by the "big, bad government." His abundant sarcasm is unnecessary and clouds his factual and theological research. Although he does cast some blame towards Koresh and his followers, the book's overwhelming focus and sympathies strongly favor the Koresh followers. The close relationships he developed with Davidian survivors and sympathizers during his research arguably compromised his journalistic objectivity.

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[2]Journalist Richard Leiby of *The Washington Post* described the Branch Davidian movement, originated in 1935 (long before Koresh's birth), as "a weird offshoot of millennia1 Seventh-Day Adventism"

Mr. Reavis's thesis, prevalent throughout the book, is that the government mishandled the Waco incident and bears ultimate blame. Although he fails to say what the government could have done differently, he suggests that David Koresh could have and should have been arrested away from Mount Carmel. Reavis offers evidence that the ATF planned the February 1993 raid based on an illegal warrant, and orchestrated it complete with Hollywood-style theatrics and cameras placed in military helicopters. Agents on the ground gave the raid the code name "Showtime" and gave no thought to the possibility that Koresh might not give up immediately based on their excessive show of force.

Author Reavis fails dramatically to give his promised definitive account of "what really happened at Waco."[3] It is intellectually dishonest for him to promote the book as representing both sides of the conflict. Rather, Reavis successfully provides a detailed account of a grand-standing, self-taught theologian's rise to infamy, and the devastation which resulted. To his credit, Reavis does raise several unanswered questions of government involvement, including the possibility of agency rivalry and political maneuvering which may have prompted actions of both the ATF and the FBI.

The book opens with Vernon Wayne Howell's illegitimate birth in 1959 and his troubled, abused childhood. An illegitimate child of a fourteen-year-old mother, he was raised in the Adventist Church and was known to lecture his junior high classmates on the Bible. However, he failed to practice what he preached. When he was eighteen, he met his first love, a sixteen-year-old girl who soon became pregnant and had an abortion when he refused to acknowledge parenthood. They later resumed their relationship, but because Vernon thought the Bible prohibited birth control, they did not practice it. When she became pregnant a second time, her father ran Vernon off. Shortly thereafter, he underwent a religious experience while sleeping in his pickup. God told Vernon that he would give him the girl later. A sexual obsession would weigh greatly throughout David Koresh's life.

Mr. Reavis explains that Vernon fathered seventeen children by various females prior to his death in an attempt to "preserve the flock."[4] Howell believed his sexual exploits were commanded by the

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[3] An obvious example of the undercurrent of Reavis's antigovernment sentiment opens chapter 14, titled "The Government's Flying Machines." "If David Koresh's Bible interpretations were the stuff of fantasy, they met their match in the bold, flying leap that the ATF took at justice on February 28."

[4] According to Reavis, two of these children were born to underage mothers who were not wives of Howell, and others were by adult women who were already wed. ***See*** *supra* note *, at 112.

Bible and that "seed-scattering" was his duty. He liberally defined "marriage" to fit his own needs, and took many wives, most under the age of seventeen. Rather than recognize Howell's actions as polygamy and statutory rape, which they were, author Reavis systematically supports such sexual exploits with Biblical passages. Reavis likens "the Waco Messiah" to Adam[5] and supports Howell's illegal acts with underage females by noting that the Bible considered females of child-bearing age to be appropriate mothers. Reavis alludes that Howell's sexual conquests were consensual. Moreover, Reavis explains, as God established the age of consent, Howell and his followers were "like most devout Christians" who believe God's laws "are of greater consequence than those made by earthly powers."[6]

The ease with which Reavis compares Howell to other devoted Christians is reprehensible. Further, Reavis offers no balance to his picture of the Davidians as peaceful, well-meaning people who practiced their rightful religious freedom. Howell was socially justified in exploiting people and laws because ***he believed*** he was of God.

Diagrams of the first and second floors and an artist's rendering of the Mount Carmel Center help orient readers to most of the action in the book. Other than the book's glossy paper cover photograph, it contains no other drawings or photographs. Reavis went to great length to personalize Koresh and his followers, and it is surprising and unfortunate that he failed to include pictures. I imagine that most photographs of David Koresh would contradict the mental picture Reavis has painted of him.

Reavis describes several pages of published sources at the end of his **book.** However, he fails to credit specific sources with specific accounts in the book. For example, Reavis uses Koresh's own words in describing a great part of the book's first chapter, dealing with Koresh's illegitimate birth and his earliest religious and sexual experiences. Were these taken from the transcripts of conversations between Mount Carmel and the FBI? Are they included in Koresh's writings? Did followers give this information to Reavis?

Reavis admits the government's case is essentially made in two volumes of the Treasury Department's report on the ATF investigation of Vernon Wayne Howell and in the trial transcripts of the survivors. Several books supporting both the government's version and the Davidians' side are also cited. References to theological works spanning the nineteenth and twentieth centuries which impacted on

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[5]"Like Adam, the Waco Messiah **also** believed that his conquest of the world would come through replenishing it" *Id.* at 111.

[6]*Id.*

Davidianism are also provided. Readers interested in David Koresh and his theology will find these listings useful.

David Koresh's doctrinal legacy itself is scant. Throughout his negotiations with federal agents during the siege, he purportedly was working on an interpretation of the Seven Seals, referenced in the Bible's Book of Revelation. His explanation of the First Seal, together with a few letters and some early audiotapes, have been preserved by some of his followers. Some of these works are available by E-mail and Reavis gives readers the address to obtain this information.

Reavis also notes that several scholars of the Bible, including Professor James Tabor from the University of North Carolina, found Koresh's interpretation of the First Seal to have some religious merit and basis. Professor Tabor is the coauthor of *Why Waco? Cults and the Battle for Religious Freedom in America,* which also was published in July 1995. Because of their similar contents and simultaneous release dates, many critics reviewed these books together. Comparison of the two was inevitable. Primarily, the Reavis book was seen as an expos6 of the government's stupidity during the siege, while the Tabor book points blame on the "anticultists" and 'cultbusters" who have created an environment which threatens America's religious freedom. Bill Broadway, of *The Washington Post,* wrote that both books blame the government's lack of understanding of Koresh's claim that he was sent to open the cryptic Seven Seals in the Book of Revelation. In a review printed July 30, 1995, Broadway portrayed *The Ashes of Waco* as "a loosely woven—and often loosely documented—account of events" containing "thousands of details, many quirky and insightful, others ridiculous."

In a September **3,** 1995 book review printed in *The New York Times,* writer Mark Silk criticized Reavis for his failure to draw firm conclusions about Koresh, "taking refuge instead in a needling sarcasm that ill suits the tragic story he has to tell." According to Silk, Reavis also failed to consider the effect professional "cultbusters" had in shaping the Waco events.

The *Dallas Morning News* called Reavis's book "candid," despite his occasional substitution of style for substance. Critic John Gamino praised his fellow Dallasite for his candor throughout the book. However, Gamino points out that the book's dust cover surprisingly calls this "the definitive book" on the Mount Carmel tragedy, thus setting "an impossibly high standard."

This book must be viewed critically as one person's interpretation of events involving David Koresh and the Branch Davidians who resided at Mount Carmel. Readers must contend with Reavis's

antigovernment bias, a task I found almost insurmountable. This book is *not* the definitive work of what happened at Waco. as claimed. Rather, it is the sad story of a self-obsessed man who tragically touched the lives of many more than the eighty persons who died at Mount Carmel.

HIROSHIMA IN AMERICA FIFTY YEARS OF DENIAL*

REVIEWED BY MAJOR EMMETT G. WELLS**

Last year marked the fiftieth anniversary of the close of World War 11. Tragically, the year also witnessed continuing acts of genocide around the world and a failure on the part of the international community to heed the lessons of Nuremberg. Perhaps it is symptomatic of this worldwide failure that our own nation persisted during 1995 in its attitude of denial toward the final horror of World War 11: the atomic bombing of Hiroshima and Nagasaki. While the United States Postal Service attempted to commemorate the bombing with a stamp featuring a mushroom cloud, a conservative outcry prevented the Smithsonian Institution from displaying photographs of the carnage caused by the bombing. This national refusal to come to terms with the reality of Hiroshima is the theme of *Hiroshima in America*.

All too often, debate on this subject is shrouded in references to the countless Japanese atrocities and the unquestionable justice of the Allied cause. Those arguments lose sight of the moral principle that combat — even combat for a just cause — should be waged against combatants. The bombing of Hiroshima and Nagasaki violated this principle, notwithstanding the evil nature of our Axis adversaries. The authors, Robert J. Lifton and Greg Mitchell[1] show that our refusal to recognize that violation betrays our own values as a nation and undermines our ability to prevent future nuclear wars-even in the wake of the collapse of the Soviet Union.

Defenders of the bombing of Hiroshima and Nagasaki frequent-

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*ROBERT J LIFTON & GREG MITCHELL, HIROSHIMA IN AMERICA: FIFTY YEARS OF DENIAL (New York G.P. Putnam's Sons 1995); 425 pages, $27.50 (hardcover).

**Judge Advocate General's Corps, United States Army. Written when assigned as a Student, 44th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

[1]The authors both have written extensively on the atomic bombings of Japan, as well as other subjects of history. Lifton, Distinguished Professor of Psychiatry and Psychology at John Jay College and the Graduate School of the City University of New **York,** won the National Book Award in 1969 for *Death in Life: Survivors of Hiroshima*. His book *The Nazi Doctors: Medical Killing and the Psychology of Genocide* received the *Los Angeles Times* Book Prize for history. Greg Mitchell, a former editor of *Nuclear Times* magazine, won the 1993 Goldsmith Book Prize from Harvard University for his **work,** *The Campaign of the Century: Upton Sinclair's Race for Governor of California and the Birth of Media Politics.*

ly accuse critics such as Lifton and Mitchell of "hindsight"[2] and "Monday-morning quarterbacking."[3] Ironically, it was the "official narrative" formulated by the Truman Administration to justify the bombing that was largely an afterthought. The Manhattan Project that produced the bomb had long since taken on its own "technological and organizational dynamism"[4] and created what the authors term an atrocity-producing situation—"a psychological and political environment structured so as to motivate the average person to engage in slaughter."[5] There was little discussion within the administration prior to dropping the bomb,[6] and President Harry Truman would repeatedly insist years later that he had lost no sleep over the decision.7

Moreover, Lifton and Mitchell show that a government cover-up began on August 6, 1945, when President Truman made a public announcement that the atomic bomb had been dropped on what he described as "an important Japanese Army base"[8] even though the bomb had been aimed at the center of a city with a population of 300,000.[9] From that point on, the government attempted to suppress information about civilian casualties and radiation poisoning.[10] Reporters were banned from Hiroshima and Nagasaki,[11] and film footage was suppressed until 1968.[12] The deaths of more than a dozen United States prisoners of war in the Hiroshima explosion were covered up until 1979.[13]

Meanwhile, the authors show that the government was propagating an "official" Hiroshima narrative. In November 1945, Hollywood granted the right of script approval to President Truman and General Leslie Groves for ***The Beginning or the End,*** a film version of the Hiroshima story.[14] The Truman Administration ordered several revisions of the script, resulting in a film that, among other things, falsely depicted Truman ordering the showering of warning

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[2]***See, eg.,*** Jules Wagman, ***"Denial" Misses the Point,*** KAN. CITY STAR, Oct. 29, 1995, at J9 (accusing Lifton and Mitchell of "[s]ubstituting hindsight for foresight").

[3]President Truman and advisor James Bryant Conant frequently used this expression. ***See Lifton & Mitchell, supra*** note *, at 175.

[4]*Id.* at 120.

[5]*Id.* at 117.

[6]*Id.* at 144-45.

[7]*Id.* at 176.

[8]*Id.* at 4.

[9]*Id.* at 5.

[10]*Id.* at 50-55.

[11]*Id.* at 46-50.

[12]*Id.* at 57-58.

[13]*Id.* at 55-56.

[14]*Id.* at 73-74.

leaflets on the Japanese population prior to the bombing.[15] Characteristically, the film changed the name of one of the four bombers from *Bock's Car* to *Necessary Evil*.[16]

Public awareness, however, began to emerge with the publication of John Hersey's article "Hiroshima" in the *New Yorker* on 31 August 1946, describing the human effects of the attack. In 1947, amidst growing public doubts about the morality of the bombing, the Truman Administration literally commissioned Secretary of War Henry L. Stimson to write an article defending the action.[17] To this day, this article continues to influence debate on the subject, even though it was false, or misleading, in many respects.

For example, Stimson characterized the bombing as "our least abhorrent choice"[18] given the sole alternative of an invasion "expected to cost over a million casualties, in American forces alone."[19] Leaving aside that the "million casualties" estimate was a complete fabrication,[20] invading Japan had not been the only alternative. The sole impediment to Japanese surrender prior to the bombing had been Japan's insistence on keeping her emperor, and the bombing of Hiroshima did nothing to change that.[21] The anticipated Soviet entry into the war against Japan (scheduled for August 15, 1945) would have been the *coupe de grace*.[22] Yet, recommendations on the part of some scientists for a warning or a demonstration on uninhabited territory fell on deaf ears, notwithstanding that a secret demonstration before United States administrators at the Trinity test site had proven successful three weeks earlier.[23]

The "official narrative" was designed to obscure the painful

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[15] *Id.* at 364.

[16] *Id.* at 361.

[17] *Id.* at 93-103.

[18] *Id.* at 108.

[19] *Id.* at 109.

[20] The actual estimate by the Joint Chiefs of Staff in June 1945 had ranged from twenty-five to forty-six thousand—"grim enough but a fraction of the number [later] asserted by Truman, Stimson, and others." *Id.* at 274.

[21] *Id.* at 133-36. A recently discovered top-secret War Department study concludes that Japanese leaders had decided to surrender in 1945 and a full-scale invasion of Japan in 1946 would not have occurred, Karen D. Steele, ***A-Bomb Splits Vets, Historians,*** SPOKESMAN REV., Aug. 7, 1995, at A1. Steele quotes J. Samuel Walker, chief historian of the United States Nuclear Regulatory Commission, as saying, "The bomb was not needed to avoid an invasion. . . . It is clear that alternatives to the bomb existed and that Truman and his advisers knew it."

[22] LIFTON & MITCHELL, *supra* note *, at 149-50. But the United States needed to demonstrate the bomb's destructiveness to gain political leverage aginst the Soviets. *Id.* at 160; *see also* GAR ALPEROVITZ, THE DECISION TO USE THE ATOMIC BOMB (1995).

[23] LIFTON & MITCHELL, *supm* note *, at 154-55.

truths about Hiroshima. The atomic bomb dropped on that city immediately killed 100,000people and fatally injured at least 50,000 others.[24] At least sixty percent of the city was wiped off the map, yet less than ten percent of Hiroshima's manufacturing, transportation, and storage facilities—that portion having military significance—was damaged.[25] The bomb was detonated at 1800 feet to "maximize the area that would be devastated by the blast and burn effects."[26] This bombing violated everything for which this nation stands; consequently, our national response has been, and continues to be, one of denial.

The theory that the atomic bomb actually saved lives by preventing an invasion is characteristic of this denial and represents what Lifton and Mitchell call moral *inversion*— "rendering the weapon a preserver rather than a destroyer of life."[27] The danger of such inversion is that it fuels not only our insistence on maintaining a nuclear arsenal, but also our willingness to use it. At the same time, with respect to Hiroshima, we have engaged in psychic numbing—"a sustained tendency toward, one way or another, avoiding feeling in connection with what happened there."[28] Like moral inversion, this psychic numbing threatens our well being, because "the numbing *does* not stop with *Hiroshima.*"[29] Arguably, it increases our tolerance for "fratricidal horrors and ethnic atrocities"[30] such as those in Bosnia and Rwanda.

Lifton and Mitchell analyze Hiroshima-related denial as expressed by the various parties involved—the decision makers, especially President Truman; the scientists who developed the bomb, such as Oppenheimer and Conant; the pilots and crewmen who dropped the bomb; and our nation as a whole. The authors view the perpetrators of the bombing as survivors of an atrocity, albeit with a different perspective from that of the victims.[31]

One of the most pernicious charges leveled against critics of the bombing is that they dishonor the memory of United States service members who fought in the war.[32] Lifton and Mitchell do nothing of

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[24] *Id.* at xvii.

[25] *Id.* at 24 n.*.

[26] *Id.* at 44.

[27] *Id.* at 308.

[28] *Id.* at 338.

[29] *Id.* at 339.

[30] *Id.* (quoting William Styron, NEWSWEEK, Jan. 11, 1993, at 29).

[31] *Id.* at 207-09.

[32] A reviewer in *Newsday*, for example, shrilly denounced Lifton and Mitchell as "imply[ing] that Allied veterans were close cousins to the Waffen SS." ***See*** Eric M. Bergerud, ***Dropping the*** *Bomb*, NEWSDAY, **Aug.** 6, 1995, at 31.

the sort. Indeed, they forcefully demonstrate that the theory of the bomb's "necessity" to end World War II

> shifts the credit for defeating the Japanese from the military personnel in the Pacific to a small group of bomb makers in New Mexico and decision makers in Washington. To fully justify the use of the bomb is to reject the notion that Japan was already on its knees, devastated and surrounded, and ready to surrender, thanks to the U.S. soldiers, pilots, and seamen who had defeated the enemy, at great cost, in one battle after another across the Pacific. Veterans accept, even promote, the bomb as necessary to end the war when they could, with justification, claim that they had already completed the job.[33]

Yet veterans' groups were instrumental in censoring the Smithsonian Institution's planned exhibit of the bomber Enola *Guy.* They accused the Smithsonian of "politically correct curating"[34] for presenting both sides of the controversy over whether the bomb should have been dropped. In the end, the Smithsonian was forced to eliminate photographs of the destruction of Hiroshima and scale back the exhibit at the Air and Space Museum to a simple showing of the bomber's fuselage.[35]

The Smithsonian controversy was symptomatic of the larger denial on the part of our society as a whole. Public discourse on the matter was guided by a mass media which consistently misrepresented the Smithsonian script to make it appear anti-American and pro-Japanese. The media "reduced the controversy to a trivial question of 'political correctness,'"[36] the irony of which is, as Lifton and Mitchell point out, that reopening debate on the Hiroshima narrative has never been "politically correct."

Fifty years of denial has taken a costly toll on our moral health as a nation. It has led to an overall refusal to recognize the essential evil of nuclear weaponry and its threat to the planet we live on. It led to our refusal to adopt a "no first use" policy and fueled the arms race throughout the Cold War. It compelled President Truman and subsequent presidents to be willing to drop atomic bombs again — as has nearly happened several times.[37]

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[33] LIFTON & MITCHELL, *supra* note *, at 240.

[34] *Id.* at 340.

[35] *Id.* at 293-96.

[36] *Id.* at 286.

[37] *Id.* at 211-22.

Lifton and Mitchell observe that the demise of the Soviet Union has in some ways increased, rather than decreased, the nuclear threat, because warheads are now in the hands of unstable governments.38 The legacy of Hiroshima, moreover, is the ease with which all governments continue to resort to "violent and destructive behavior."[39]

The authors conclude by offering their work as a patriotic contribution to the fiftieth anniversary of World War 11—"as an appeal to our own better angels, for the renewal of what is most compassionate and open and honorable in the American spirit."[40] A fascinating appendix[41] explores American cultural responses to Hiroshima, including such films as *The Beginning or the End* (1946) and *The Day After* (1983), and the written works of Kurt Vonnegut and Joseph Heller.

Despite the controversial nature of *Hiroshima in America*, the book is devoid of polemic. It treats its subject with the dispassionate tone that is necessary for reasoned, public discourse on this matter. The work is eminently readable and should prove useful to anyone desiring an informed background on atomic weapons. The book may devote perhaps an excessive number of pages (eighty-six in all) to a psychoanalysis of Harry Truman.[42] On the other hand, if we are to prevent future Hiroshimas, it is important for us to understand the psychological framework by which good men are thrust into atrocity-producing situations. An awareness of the potential for such situations is what makes this book essential reading for practitioners of military law.

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[38]"Nuclear diplomacy" continues to play a major part in world affairs, as shown by recent controversies over French nuclear testing and China's firing of test missiles off the coast of Taiwan.

[39]*Id.* at 358.

[40]*Id.*

[41]*Id* at 359-81.

[42]*Id.* at 117-203.

By Order of the Secretary of the Army:

DENNIS J. REIMER
General, United States Army
Chief of Staff

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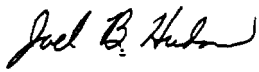

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